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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Julia McCain Lampkin-Asam, Ph.D.
Appellant

vs.

District Court of Appeal, Third District of Florida; Supreme Court of Florida; State of Florida; Miami Daily News, d/b/a/ The Miami News, and Timothy Johnson, as personal representative of the late Terry Johnson King
Appellees

On Appeal from District Court of Appeal, Third District of Florida

JURISDICTIONAL STATEMENT

Julia McCain Lampkin-Asam, Ph.D.
Appellant, Pro Se
2243 Gorham Avenue
Ft. Myers, Florida 33907

QUESTIONS PRESENTED

I. Whether the highest court of the state (Supreme Court of Florida) can decide a case on a discretionary basis (i.e. not accept jurisdiction) if federal question (First Amendment to U.S. Constitution case on public figure and actual malice issues --instant case) is raised in which the state law (Article V, Section 3(b)3, Florida Constitution) is repugnant to the federal law (First Amendment to U.S. Constitution case -- instant case; lack of "due process" to highest state court - Fourteenth Amendment to U.S. Constitution; and no jury trial - Sixth Amendment to U.S. Constitution for "actual malice" issue)?

II. Whether a state statute, Florida Statute, Article V, section 3(b)3, Florida Constitution (1980), has infringed upon the U.S. Constitutional rights ("due process" of the Fifth and Fourteenth Amendments to

the U.S. Constitution) of the Appellant to have access to the highest court of the state, The Supreme Court of Florida?

III. Whether the Supreme Court of the United States can take original jurisdiction under 28 USC Section 2106 of a state case concerning a federal question on the First Amendment to the U.S. Constitution (public figure and actual malice issues) when a state law (Article V, section 3(b)3) prevents the highest court in the state (Supreme Court of Florida) to consider the federal question as a matter of right but only on discretionary basis?

IV. Whether the Supreme Court of the United States can take original jurisdiction under 28 USC 2106 to decide if Dr. Lampkin-Asam is a public figure in the constitutional sense for purposes of libel?

V. Whether the state court (District Court of Appeal, Third District of Florida) has violated the rights of Dr. Lampkin-Asam

under 42 USC 1983 by this Third District Court of Appeal of Florida not remanding the instant case to the lower court for a jury trial on the "actual malice" issue after this Third District affirmed Dr. Asam to be a public figure?

VI. Whether Dr. Asam's rights under the 1st and 6th Amendments to the U.S. Constitutuion have been violated when the District Court of Appeal, Third District of Florida, ignoring Florida law (see p. 22-23 of this brief), can rule that "actual malice" is settled by summary judgment after the same court ruled the Appellant to be a public figure in the constitutional sense and when geniune issues of material facts exists in the record clearly showing "actual malice" as defined in the New York Times Co. v. Sullivan, 376 U.S. 254, 11 L Ed. 2d 686, 84 S Ct 710 (1964). (See pp. 26-35 of this brief for references in the record to "actual malice").

VII. Did the Florida Statute, Florida Constitution (1980), Article V, section 3(b)(3) by blocking Dr. Asam's access to the highest state court (Supreme Court of Florida), infringe upon Dr. Asam's property rights as a cancer research scientist and equal protection of the law rights under the Fourteenth Amendment to the U.S. Constitution when the said statements, (see p. 25 of this Brief), impugning on the capacity and fitness of her profession, were "libelous per se", in the Miami News (Oct. 23, 1973)?

PARTIES TO THE PROCEEDING

Julia McCain Lampkin-Asam, Ph.D. Appellant, (Plaintiff, Appellant and Petitioner below).

Miami Daily News, Inc., a Florida Corporation, d/b/a/ The Miami News, and Timothy Johnson, as personal representative of the late Terry Johnson King, Appellees, (Defendants, Appellees, and Respondents), Attorney Mr. Joseph P. Averill

State of Florida

Hon. Governor Daniel Robert Graham

Attorney General, Jim Smith

The Supreme Court of Florida

District Court of Appeal, Third District of Florida

Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

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The Book Exchange, Sardina House, Kingsway, London, WCw, Aug. 1974 (Unsolicited Book Review of Malignant Intrigue) ..48

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No. _____

IN THE

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October Term, 1982

Julia McCain Lampkin-Asam, Ph.D.
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vs.

District Court of Appeal, Third District of Florida; Supreme Court of Florida; State of Florida; Miami Daily News, d/b/a/ The Miami News, and Timothy Johnson, as personal representative of the late Terry Johnson King
Appellees

On Appeal from District Court of Appeal, Third District of Florida

JURISDICTIONAL STATEMENT

OPINIONS BELOW

Opinion filed December 29, 1981, by the District Court of Appeal of Florida

Third District is in the Appendix p. a-1 of this Brief).

JURISDICTION

This is an appeal from the final judgment of the District Court of Appeal, Third District of Florida rendered December 29, 1981 (Opinion filed December 29, 1981 p. a-1-a-9 of the Appendix of this brief); rehearing denied on January 27, 1982; and jurisdiction denied by the Supreme Court of Florida June 7, 1982 based on Florida Constitution (1980), Article V, Section 3(b)3, now making the District Court of Appeal, Third District of Florida, the highest court to review the merits of this instant case in the state of Florida. The Notice of Appeal to the Supreme Court of the United States was timely filed on June 25,1982 within the ninety days limit from June 7, 1982.

The jurisdiction of this Court rests on 28 USC section 1257(2),28 USC section

2106, 28 USC Section 1343(3) and 42 USC Section 1983 as well as the First, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution: Amendments I, V, VI, and XIV (See pp. a-33-34 of the Appendix for quotes of Amendments).

Florida Statute, Article V, section 3(b)(3) of Florida Constitution (1980), (See p. a-34 of the Appendix for quote).

Quotes from the U.S.C. concerning the jurisdiction of The Supreme Court of the United States for 28 USC sec. 1257(2), 28 USC sec. 2106, 28 USC sec. 1343(3) and 42 USC sec. 1983 are on p. a-35 of Appendix.

STATEMENT OF THE CASE

This is a libel case which is involved with the "public figure" and "actual malice" issues in the constitutional sense. A Complaint was filed on Oct. 16, 1975,

(Record (R) 1-6). The Plaintiff below, Appellant and Petitioner, is Julia McCain Lampkin-Asam, Ph.D. The Defendants below, Appellees, and Respondents are the Miami Daily News, Inc., a Florida corporation d/b/a/ The Miami News and Timothy Johnson as personal representative of the late Terry Johnson King. Upon motions to dismiss (R 9-10, 13-4) and stipulation of the parties (R 24), one of the defendants was "removed as a party to this action" (R 23). An Amended Complaint was filed naming as Defendants Wilhelmina Francis Dunning, Terry Johnson King and Miami Daily News, Inc. (R 22-30). The Count I from this Amended Complaint is quoted in Appendix p. a-31 to clearly show that from the beginning of this case a First Amendment to the U.S. Constitution question existed.

The motions to dismiss filed by these defendants (R 31-32,34-35) were denied (R-36). Defendant Dunning answered (R 37-

38). Defendants King and Miami Daily News filed a joint answer in which Miami Daily News filed a counterclaim (R 40-44). Count III of the Amended Complaint was voluntarily dismissed (R 594) as was the counterclaim (R 1051). Summary judgment motions were filed by each of the defendants (R 1108,1109,1223-1225) and the plaintiff (R 1448-1449). Summary judgment was entered for defendant Dunning (R 1471-1472). The Plaintiff's attorney in the libel case did not timely file the appeal in 1978 and the Writ of Mandamus to the Supreme Court of Florida was denied because the attorney sent the appeal to the wrong court also. This was the loss of defendant Dunning. The Plaintiff's attorney filed no other pleadings after not timely filing the appeal for almost a year and did not set the Miami News et al. case for trial after the Summary Judgment was denied on the public figure and actual malice

issues March 8, 1978 (R 1473 and see Appendix p. a-22). The reconsideration of defendants Miami Daily News and King (R 1475-1476) was denied (R 1483) July 26, 1978 (see Appendix p. a-23). Another attorney was hired for the Plaintiff in 1979 and the case was not set for trial until March 1980. The judge delayed the trial to September 1980 because of his work schedule. At the pretrial conference an issue again arose as to the Plaintiff's status as a public figure (R 1901), and the court entered an order determining that the plaintiff was a public figure (reversing its own decision March 8, 1978 denying Summary Judgment on the public figure issue from the same record) for purposes of applying the law of defamation (R 1901-1904). Thus, Judge Dan Satin of the lower circuit court reversed his own decision (March 8, 1978 denying Summary Judgment - Appendix p. a-22) Sept.20,1980

and the judge cancelled the trial. Furthermore, the judge had denied reconsideration of this same public figure issue July 26, 1978 (see Appendix p. a-23). On Oct. 8, 1980, the court entered a Summary Final Judgment for defendant Miami Daily News et al. (R 2053-2057) reversing the judge's own denial of Summary Judgment dated March 8, 1978 (R 1473) on the same issue ("public figure" and "actual malice" -- see R 1435-1440, Memorandum on "actual malice"). Soon after Judge Dan Satin reversed his own decision on the public figure and actual malice issues, the judge died of a terminal disease; therefore, the judge was obviously sick when he reversed his own summary judgment dated March 8, 1978 denying the Miami News summary judgment on the public figure and actual malice issues. Because of the above reversal by the judge of his decision of March 8, 1978, over two years later,

the libel case was never tried by a jury. After Oct. 8, 1980 (R 2053-2057), when the court entered a Summary Final Judgment for defendants Miami Daily News et al, a motion for rehearing (R 1907-1908) was denied (R 1909). The plaintiff filed a notice of appeal (R 1910-1911).(See Appendix p. a-13.) The District Court of Appeal, Third District of Florida on Dec. 29, 1981 affirmed the lower court decision of summary judgment on the public figure and actual malice issues and filed a seven page opinion. (see Appendix p. a-1-a-9). On Jan. 5, 1982, the Appellant, (Plaintiff below), filed a Motion and Petition for Rehearing which was denied on Jan. 27, 1982 (see Appendix p. a-10). On Feb. 18, 1982 petitioner, appellant and plaintiff below requested the Supreme Court of Florida to invoke its Discretionary Jurisdiction (see Appendix p. a-12) to review this cause based upon two grounds: (1) that the decision

expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law, and (2) that the decision expressly construes a provision of the state or federal constitution. On June 7, 1982, the Supreme Court of Florida denied jurisdiction based on Article V, section 3(b)(3), Florida Constitution (1980). The Notice of Appeal to The Supreme Court of the United States (p. a-24 of Appendix) was timely filed June 25, 1982 in the District Court of Appeal, Third District of Florida and a copy was sent to the Supreme Court of Florida.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I. <u>The state statute, Florida Constitution (1980), Article V, section 3(b)(3)</u> (quoted on p. a-34 of the Appendix) <u>did infringe upon the U.S. Constitutional rights</u> (First Amendment to U.S. Constitution- instant

case, concerning "public figure" and"actual malice" issues; lack of "due process" to highest state court - i.e. "due process" under the 5th and 14th Amendments to the U.S. Constitution and "equal protection" under the 14th Amendment to the U.S. Constitution; and no jury trial - Sixth Amendment to U.S. Constitution for "actual malice" issue), of the Appellant to have access to the highest court of the state, The Supreme Court of Florida. In other words, the higheat state court (The Supreme Court of Florida) denied jurisdiction (p. a-11 of the Appendix), of a case involving a federal question (First Amendment case of libel involving "public figure" and "actual malice" issues), and denied the jurisdiction of the instant case on a discretionary basis based on Article V, section 3(b)(3), Florida Constitution (1980), (see p. a-34 of Appendix for a quote of this statute), a new state of Florida statute which is

repugnant to the federal question. In this instant case, the federal question, concerning the First Amendment of the U.S. Constitution of whether Dr. Asam is a "public figure" and whether the "actual malice" issue, should have been remanded to the lower court for a jury trial for the devastating, false and defamatory statements which were known to be false before publication, (see pp. 25-36 of this brief for statements in the record clearing showing actual malice was shown by the reporter from the Miami News). See New York Times Co. v. Sullivan, 376 U.S. 254, 11 L Ed. 2d 686, 84 S Ct. 710 (1964), for the definition of "actual malice", and discussed on p. 24 of this brief.

The Supreme Court of the United States can take jurisdiction of the instant case under 28 USC section 1257(2) and 28 USC section 2106.

See Horwitt v. Horwitt, D.C., Conn. 1950, 90 F Supp. 528 (quote on p. 12),

"United States Supreme Court may review directly the decision of the highest state courts on the constitutionality, under the Federal Constitution, of state statutes."

Also see Bantam Books, Inc. v. Sullivan, R.I., 1963, 83 S Ct 631, 372 U.S. 58, 9 L. Ed 2d 584, which states,

"The Supreme Court's appellate jurisdiction was properly invoked, where the state court judgment sought to be reviewed upheld a state statute against contention that on its face and as applied, the statute violated the federal Constitution."

See Standard Oil Co. v. Graves, Wash. 1919, 39 S Ct 320, 249 U.S. 389, 63 L Ed. 662, which states,

"While the Supreme Court follows the decision of the highest state court as to the meaning of a state statute which asserted to violate the Federal Constitution, the name given to the statute is not conclusive, and it must be judged by its necessary effect, and if that is to violate the Constitution of the United States the law must be declared void. (Emphasis added.)

II. In the instant case, a new Florida Statute, Article V, section 3(b)(3) of the Florida Constitution (1980), has prevented the Appellant access to the highest court of the state (The Supreme Court of Florida). Thus, the Appellant's conatitutional rights of "due process" in a court (5th and 14th

Amendments to the U.S. Constitution) and equal protection of the law (14th Amendment to the U.S. Constitution) have been infringed by this new Florida Statute, (Article V, section 3(b)(3), Florida Constitution), because the Appellant's right to a trial by a jury on the "actual malice" issue after the District Court of Appeal, Third District of Florida, affirmed that Dr. Asam was a "public figure", was prevented when the Supreme Court of Florida denied jurisdiction based on this Article V, section 3(b)(3), and considered a federal question (First Amendment case involving public figure and actual malice) on a discretionary basis and in this instant case did not consider the case at all, (p. a-11 of Appendix).

See Turpin v. Lemon, 187 U.S. 51, 23 S Ct. 20, 47 L Ed 70.

> "The clause "due process of law" means that there can be no proceeding against life, liberty, or property which may result in the deprivation of either,

"without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Also see Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L Ed. 2d 935, stating,

"The right of access to the courts is founded in the due process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."

III. The Supreme Court of the U.S. can take original jurisdiction under 28 USC section 2106 of a state case concerning a federal question on the First Amendment to the U.S. Constitution (public figure and actual malice issues) when a state law (Article V, section 3(b)(3) prevents the highest court in the state (The Supreme Court of Florida) to consider a federal question as a matter of right but only on a discretionary basis (in the instant case the Supreme Court of Florida denied jurisdiction - see p. a-11 of the Appendix). See Super Tire Engineering Co. v. McCorkle, D.C.N.J.

412 F Supp. 192, aff. 550 F 2d 903, cert. denied, 98 S Ct. 106, 434 U.S. 827, 54 L. Ed 2d 86, reh. den. 98 S. Ct. 753, 54 L. Ed. 2d 773, states (550 F 2d 903 at 903),

> "Federal rights are denied as well by refusal of a state court to decide a question, as by an erroneous decision of it" ...

This denial of jurisdiction by the Supreme Court of Florida, (p. a-11 of Appendix) is the reason that the instant appeal is taken from the District Court of Appeal, Third District of Florida, the last court to decide on the merits of the instant case. The District Court of Appeal, Third District of Florida affirmed that Dr. Asam was a public figure but the Third District of Florida failed to remand the case to the lower court for a jury trial on the "actual malice" issue when clear and convincing evidence of actual malice is in the record, (i.e. the District Court of Appeal failed to read the record (pp. 26-36 of this brief refers to the exact pages in the record and

the Appellant's Brief pp. 13-14 in the District Court of Appeal, Third District, and this court ignored the Motion and Petition for Rehearing - 24 pages with 19 pages of exhibits clearly showing actual malice with quotes from the record).

See Atlantic Coast Line Railroad Co. v. Brotherhoods of Locomotive Engineers, 398 U.S. 281, 286, 90 S. Ct. 1739, 26 L Ed. 2d 234 (1970).

> "Only the Supreme Court was authorized to review on direct appeal the decisions of state courts."

See also Turpin v. Lemon supra, and Wolff v. McDonnell, supra.

IV. The Supreme Court can take original jurisdiction under 28 USC section 2106 to decide whether Dr. Asam is a public figure in the constitutional sense. (see New York Times Co. v. Sullivan, supra). Dr. Asam is not a public figure for purposes of the First Amendment. The District Court of Appeal, Third District of Florida is incorrect by affirming that Dr. Asam is a public

figure. Numerous well known and well publicized individuals have been held not to be public figures for the purpose of the New York Times Standard, Gertz v. Welch, 418 U.S. 323, 41 L Ed. 2d 789, 94 S.Ct. 2997, (1974), Time, Inc. v. Firestone, 424 U.S. 448, 47 L Ed. 2d 154, 96 S.C. 958 (1976), Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 99 S.Ct. 2701, 61 L. Ed. 2d 450 (1979),and Hutchinson v. Proxmire 443 U.S. 111, 61 L. ed. 2d 411, 99 S. Ct. 2675 (1979). Dr. Asam is similar to Dr. Hutchinson, both are research scientists and both published in a limited field of research. Therefore, Dr. Asam is not a public figure and the summary judgment should be reversed. (Also see pp. 15-21 of Brief of Appellant in the District Court of Appeal, Third District showing that Dr. Asam was not a public figure). The bottom line of this incorrect public figure decision by the District Court of

Appeal, Third District of Florida is that the Third District has been misled by Mr. Averill's "figment of his imagination" that Dr. Asam is a public figure by stating in his Brief of Appellees to the Third District that Dr. Asam is a public figure with no reference to the record as quoted below from Mr. Averill's Brief and Opinion (p. a-3 of the Appendix). See p. 10 of Mr. Averill's Brief of Appellees (xerox edition) and p. 8 of printed substituted edition, stating with no reference to the record,

> "She has attempted to arouse public indignation and to influence the allocation of public funds."(Quote in Opinion copied on p. a-3 in Appendix).

Dr. Asam did not influence any allocation of public funds, and did not arouse any public indignation. Further, Mr. Averill stated on p. 8 of the printed brief of Appellees,

> "She is a scientist taking part in a public debate on a public health matter." (Quote in Opinion copied on p. a-3 in Appendix).

This is a false statement with no reference to the record. The truth is that Dr. Asam

has never been in a public debate. The case should be decided according to the facts in the record, not according to what an attorney, Mr. Averill, states in an Answer Brief of Appellees without reference to the record. This is evidence of an attorney, Mr. Averill for the Miami News et al., perpetrating a fraud on the appellate court. (See pp. 7-8 Supreme Court of Florida Juriadictional Brief by Asam).

It is to be pointed out that the same Judge, Dan Satin, in March 8, 1978 (see p. a-22 of Appendix) denied motion of the Miami News for Summary Judgment based on the same issues of "public figure" and "actual malice." (R 1473). The same Judge Dan Satin denied the reconsideration for summary judgment on July 26, 1978 (see p. a-23 of the Appendix). Yet, in 1980, (unnecessary delay in setting case for trial by plaintiff's attorney, and changing attorneys) at a pretrial conference shortly before the same

Judge Satin died of a terminal disease, Judge Satin reversed his decision of March 8, 1978 and ruled that Dr. Asam was a public figure. Thereafter, Judge Satin granted a summary judgment in favor of the Miami News et al. on Oct. 8, 1980 (see p. a-16). See Greenbelt Co. op. Pub. Ass'n. v. Bresler, Md. 1970, 398 U.S. 6, 90 S.Ct. 1537, 26 L Ed. 2d 6, which states,

> "The Supreme Court's duty is not limited to elaboration of constitutional principles: the Court must also in proper cases review the evidence to make certain that those princples have been constitutionally applied."

See In re Elmore, 1967, 382 F 2d 125, 127 U.S. App. D.C. 176, which states,

> "Reviewing court has power not only to correct error in judgment under review but to make such disposition of case as justice requires."

V. The state court (District Court of Appeal, Third District of Florida) has violated the constitutional rights (First, Sixth and Fourteenth Amendments to the U.S. Constitution) of Dr. Asam under 42 USC section 1983 by this Third District

Court of Florida not remanding the instant case for a jury trial on the "actual malice" issue after the Third District Court of Appeal of Florida affirmed Dr. Asam to be a public figure (p. a-1 of Appendix). See Sweezy v. New Hampshire, 354 U.S. 234, 77 S. Ct. 1203, 1 L Ed 2d 1311, stating, "The infringement by a state of constitutional rights of individuals violate the guaranty of due process where no state interests underlies the state action" (From separate opinion by Hon. Warran, Ch.J. and Black, and Douglas, and Brennen, J. J.)

Therefore, Dr. Asam has a right under 28 USC section 1343(3) to remedy this wrong by the District Court of Appeal, Third District of Florida and Dr. Asam respectfully requests The Supreme Court of the United States to take jurisdiction under 28 USC section 1257(2) and 28 USC section 2106 and consider according to the facts in the record if Dr. Asam is a public figure.

If the Supreme Court of the United States decides Dr. Asam is a public figure, Dr. Asam respectfully requests that this

Court take whatever legal steps that are necessary when "actual malice" is clearly shown in the Record (see pp. 25-36 of this brief for references to the record showing actual malice) or the Supreme Court of the United States should remand to the lower court for jury trial on "actual malice".

See Krum v. Sheppard, D.C. Mich. 1966, 255 F Supp. 904, affirmed 407 F 2d 490,

> "The only basis for federal jurisdiction under 42 USC section 1983 is the deprivation under color of state law of any rights, privileges or immunities secured by Constitution and laws."

See Hutchinson v. Proxmire, 443 U.S. 11, 120 at fn. 9 (1979) which states,

> "The U.S. Supreme Court has noted that proof of "actual malice" calls a defendant's state of mind into question and does not readily lend itself to summary disposition."

The District Court of Appeal, Third District of Florida decision on the "actual malice" issue is in direct conflict with Florida common law. See Gadsden County Times, Inc. v. Horne, 382 So 2d 347 (Fla. 1st DCA 1980) at 347 which states,

> "In libel action, determination of plaintiff's status as a "public figure" or "private person" is one for trial judge

"to make, while issues of "actual malice" or negligence are ordinarily jury issues." (Emphasis added.)

It is to be pointed out that the First District Court of Appeal of Florida has said that in these cases summary judgment should be used sparingly so as not to infringe on the constitutional right to a jury trial. Axlerod v. Califano, 357 So 2d 1048, (Fla. 1st DCA 1978). The Second District Court of Appeal of Florida has reversed a directed verdict for the defense and ruled that the question of actual malice is for the jury. Holter v. WLCY, T.V., Inc. 366 So 2d 445, 450, (Fla. 2d DCA 1979).

VI. The constitutional rights of Dr. Asam under the First and Sixth Amendments to the U.S. Constitution has been violated because the District Court of Appeal, Third District of Florida incorrectly affirmed Dr. Asam to be a "public figure" and decided the "actual malice" issue by summary judgment, instead of remanding the "actual

malice" issue to be tried by a jury. See Goldwater v. Ginzburg, 261 F Supp. 784 (1966) at 784-785,

> "The issue of actual malice on part of defendant magazine publishers, sued by public official for libel, seemed peculiarily inappropriate for disposition by summary judgment since it concerned motive, intent and sujective feelings and reactions."

Since Dr. Asam has been declared a "public figure" by the District Court of Appeal, Third District of Florida, this case is governed by the "actual malice" standard formulated in the New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L Ed. 2d 686 (1964), which clearly states, the actual malice requirement is fully met under either of the following two circumstances: First, that the statement was made with knowledge that it was false, or Second, that the statement was made with reckless diaregard of whether it was false or not. See Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L Ed. 2d 1094, 87 S. Ct. 1975 (1967).

The false, defamatory and "libelous per se" statements published by the Miami News Oct. 23, 1973, attributed to Dr. Dunning are:

> "She is very emotionally disturbed, and has no qualifications to do cancer research. She may have gotten her doctorate from George Washington University, but I suspected they gave her the degree to get rid of her."

By this actual malice issue not being decided by a jury, Dr. Asam's rights under the First Amendment to the U.S. Constitution has been violated when a newspaper abuses the First Amendment and knowingly publishes false and "libelous per se" statements about Dr. Asam and her profession as a cancer research scientist. The said "libelous per se" statements have blocked cancer research for almost a decade.

THE RECORD IN THE INSTANT CASE CLEARLY EVIDENCES THE EXISTENCE OF "ACTUAL MALICE".

1. The Defendant KING testified unequivocally that she had read the book (referring

to Malignant Intrigue, book by Lampkin-Asam, R 1202). Ms. King, the reporter, who wrote the article, "The Mouse Doctor Who Roared", Oct. 23, 1973, knew certain statements were false; therefore, her publication of these statements evidences actual malice.

(1) The reporter, Ms. King, knew the Plaintiff had a Ph.D. degree from George Washington Univerasity; nevertheless, she published the statement, "She may have gotten her degree from George Washington University..." As stated above, Ms. King read Malignant Intrigue (R 1202) and on p. 50 of Malignant Intrigue, there is a full page reproduction of the Ph.D. from George Washington Univerasity, and on p. 48 of Malignant Intrigue there is a document evidencing plaintiff was a honor student. (Note that Malignant Intrigue is Exhibit B to the Asam deposition of August 17, 1977 (Tr. 598-1058). Plaintiff advised Ms. King

that she had a Ph.D. (R 1144,1145). Dr. Dunning denies making this statement as quoted, "I would not have said she may have gotten her doctorate degree from George Washington University because I knew she did." (R 1251,1390). A jury could believe, based on this record, that Ms. King knew that Plaintiff (now Appellant) had obtained a Ph.D. from George Washington University and that she knowingly published false and misleading alleged quote "She may have gotten her doctorate from George Washington University, but I suspect they gave her the degree to get rid of her."

(2) Ms. King knew that Plaintiff was qualified to do cancer research; nevertheless, she published the statement "... has no qualifications to do cancer research". Since Ms. King read Malignant Intrigue (R 1202),she knew that Plaintiff had completed extensive cancer research (see pp. 677-679, Malignant Intrigue, for list of

publications in cancer), that Plaintiff was a member of the American Association for Cancer Research (Malignant Intrigue p. 102), and Plaintiff had received a $91,416 grant from the American Cancer Society, (Malignant Intrigue, p. 102). During the interview Plaintiff described her training and experience to Ms. King, " (Ms. King) was able to verify, through documents, that she had been with various cancer programs." (R 1130). Nevertheless, Ms. King knowingly published the false and misleading alleged quote "She (Plaintiff)... has no qualifications to do cancer research."

(3) Ms. King knew that Plaintiff was not very emotionally diaturbed, nevertheless, she published the statement "She (Plaintiff) is very emotionally diaturbed". Ms. King admits that she did not find Plaintiff to be emotionally diaturbed (R 1156, 1157, 1193). Dr. Dunning denies ever

having said that Plaintiff was very emotionally disturbed, (R 1250,1251,1390). It was not Dr. Dunning's opinion that Plaintiff was emotionally disturbed as of Oct. 1973, (R 1157).

> "The defendant in a defamation action... cannot...automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith."

St. Amant v. Thompson, 390 U.S. 727 at 732, 88 S Ct. 1323, 20 L Ed. 2d 262, (1968); Goldwater v. Ginzburg, supra; Carson v. Allied News Co. 482 F. Supp. 406, (1979).

2. The defamatory quote attributed to Dr. Dunning was a product of Ms. King's imagination; therefore, its publication evidences "actual malice"

Quotes that are a product of the writer's imagination are written in reckless disregard for the truth. St. Amant v. Thompson, supra; Carson v. Allied News Co., supra.

Ms. King testified that the alleged quote was made by Dr. Dunning during a 15 minutes telephone conference (R 1148). Dr. Dunning does not believe she received the phone call from Ms. King, and does not recall saying anything to the Miami News about Plaintiff, (Dunning Deposition at R 1252,1254). Dr. Dunning stated, R1252,

"I do not recall ever saying anything to The Miami News about Dr. Asam."

Based upon the record, a jury could believe that Ms. King fabricated the defamatory quotes.

3. Ms. King admits she doesn't know whether or not certain statements she published were true, thereby by her own testimony, creating a jury question.

Ms. King admits that she had no opinion regarding whether or not Plaintiff was emotionally disturbed (R 1160). Ms. King further admits that she didn't know whether or not Plaintiff was qualified to do cancer research (R 1156). Nevertheless,

she published that Plaintiff "almost paranoically charges that certain persons have obstructed her research", that Plaintiff "is very emotionally disturbed", and that Plaintiff "has no qualifications to do cancer research". Ms. King published an article which was devastatingly defamatory to Plaintiff without further investigation of the truth or falsity of the charges she was publishing against her.

See Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F 2d 438

> "Record in libel action by teachers... against school board members who admitted that he did nothing to verify truthfulness of statements and did not know whether they were truthful or not created jury question on issue of defendant's malice."

The record (R-1156,1160) herein evidences that Ms. King recklessly and with "actual malice" published defamatory statements without knowing whether or not said statements were true. Therefore, Ms. King in her own testimony created a jury question.

4. The statement that a well-known, highly accredited American university had given Plaintiff a degree "to get rid of her" is so inherently improbable that only a reckless person would have circulated such an allegation.

Between 1945 and 1952, Ms. King attended Florida State College for Women, University of Florida Law School, University of Miami and Johns Hopkins University, (King Deposition - R-1188,1189). Ms. King should have been aware that Universities do not, within the normal course of events, award Ph.D. degrees in order to get rid of students. Ms. King made no effort to contact George Washington Univerasity regarding Plaintiff's records or academic achievements (R 1169).

> "Allegations that are so inherently improbable that only a reckless man would have put them in circulation are written in reckless disregard of the truth."

St. Amant v. Thompson, supra. The publication of this inherently improbable statement is evidence of actual malice.

5. Ms. King published the defamatory article relying on a biased source and in reckless disregard of the truth of her publication and made no effort to contact George Washington Univeraity nor to contact Plaintiff for a statement responding to Dr. Dunning's alleged statements (R 1169). No Miami News employee superior to Ms. King reviewed the article (R 1164).

See Amant v. Thompson, 390 U.S. 727 at 732, 88 S. Ct. 1323, 20 L. Ed. 2d 262, (1968) which states,

"Recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

Also see Widener v. Pacific Gas & Electric (1977), 75 Cal. App. 3d 415, 142 Cal. Rprt. 304; and Fopay v. Noveroske (Ill. App.), 334 N.E. 2d 79, and Holter v. WLCY T.V., Inc., supra.

"A lack of investigation where there is opportunity to investigate might be evidence of actual malice."

Carson v. Allied News Co., 482 F. Supp. 406, (1979).

See Malignant Intrigue, p. 429, showing a reprint of a news article entitled, "Dade Scientist 'Controls' Cancer" about the Appellant, dated Sept. 15, 1966, by the Miami News, showing Ms. King did not even review the Miami News article's file on Dr. Asam. Or if Ms. King did review the article on p. 429, then there is no doubt about it that Ms. King knowingly printed the false statements attributed to Dr. Dunning. Particularly, p. 429 of Malignant Intrigue would show the statement made in the news article "... has no qualifications to do cancer research," was false and Ms. King knowingly published false information in the Miami News Oct. 23, 1973, thus, "actual malice" was shown under the New York Times Co. v. Sullivan supra.

Therefore, the Supreme Court of the United States should take original jurisdiction under 28 USC section 2106 and decide if Dr. Asam is a "public figure."

The Supreme Court of the United States should take whatever steps necessary to settle the case involving "libelous per se" statements about Dr. Asam and her profession of cancer research (see p. 25 for quote from the Miami News, Oct. 23, 1973). If the Supreme Court of the United States can not settle this case, then the instant case should be remanded to the lower court for jury trial of "actual malice" issue.

The Court of the State of Florida and the U.S. Supreme Court have instructed us that the "actual malice" issue is not to be resolved by a summary judgment, but is to be decided by a jury as the finder of fact. See Hutchinson v. Proxmire, 443 U.S. 111, 120 at fn. 9 (1975); Gadsden County Times, Inc. v. Horne, supra; Axlerod v. Califano, supra; Holter v. WLCY, T.V., Inc., supra; Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F 2d 438, jury issue whether the defendant is guilty of malice;

and see Goldwater v. Ginzburg, 261 F. Supp. 784, issue as to existence of "actual malice" on part of Defendant's precluding summary judgment. Therefore, the instant case, if the Appellant is a public figure, the "actual malice" issue should not be decided by summary judgment but remanded to the lower court for trial by the jury of the "actual malice" issue.

Also see an article reproduced bearing date of March 14, 1962, printed by THE MIAMI NEWS in which reference is made to both Dr. Dunning and Dr. Julia Lampkin-Hibbard, (Dr. Asam) together with accompaning photographs of both scientists, page 12 et seq., Malignant Intrigue - Ms. King knew all of the names of Dr. Asam since she published all of the names in the said article.

To sum on "actual malice", at the time of the publication of the article in question and the offending remarks contained

therein, the Defendant King knew that the statements which she attributed to Dr. Dunning were false. Dr. Dunning denies in any event having made the statements (R 1252), (quoted on p. 30 of this brief). The "actual malice" test of New York Times Co. v. Sullivan, supra, has been squarely met.

See the record pp. 1435-1440, Plaintiff's Memorandum..., dated Jan. 23, 1978, showing "actual malice" in record, and record pp. 1877-1894, Plaintiff's Memorandum on "Actual Malice", dated Sept. 18, 1980. Also see the Appellant wrote the "Motion and Petition for Rehearing", containing 24 pages and 19 exhibits showing clear and convincing evidence of "actual malice" by both Dr. Dunning and Ms. King. The District Court of Appeal, Third District of Florida, completely ignored the record showing "actual malice" and denied the rehearing (p. a-10 of the Appendix).

The District Court of Appeal, Third District of Florida made the following false statement:

> "we find absolutely no clear and convincing evidence that the defendants knew that the information published was incorrect or that the defendants had any degree, much less a high degree of of awareness of probable falsity of this information."

See p. a-4 in Appendix, the Opinion of the District Court of Appeal, Third District of Florida for this false statement quoted above. Therefore, the District Court of Appeal, Third District of Florida did violate Dr. Asam's First and Sixth Amendments rights under the U.S. Constitution.

VII. The Florida statute, Florida Constitution, (1980), Article V, section 3(b)(3), did block Dr. Asam's access to the highest state court (Supreme Court of Florida), and as a result the "actual malice" issue was settled by summary judgment when the "actual malice" issue would have been remanded to the jury for trial. Therefore, Dr. Asam's

property rights to work as a cancer scientist have been violated under the Fourteenth Amendment to the U.S. Constitution because Dr. Asam did not have her day in court before a jury for a jury question of "actual malice" when the Miami News published the article (Oct. 23, 1973), "The Mouse Doctor Who Roared" which caused permanent and aggravated damages to Dr. Asam as a cancer research scientist. Further, Dr. Asam has not been able to find any type of work since the summer of 1978.

See Drennen v. Westinghouse Elec. Corp., App. 328 So 2d 52 (1976).

> "In action for defamation, issues concerning truth of alleged defamation and good motives in publishing alleged defamation, which together form complete defense, are normally resolved by jury."

Drennen v. Westinghouse Elec. Corp., supra was cited under Article 1, section 4, of the Florida Constitution. Also see F.S.A. Const., Art. 1, section 4 which states,

> "Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right."

See Bohenhausen v. Cassat Avenue Mobile Homes, Fla. App. 344 So 2d 279, stating,

> "General damages" recoverable in defamation suit are those which law presumes must naturally, proximately and necessarily result from publication of libel or slander; they are allowable whenever immediate result is to impair plaintiff's reputation, although no actual pecuniary loss is demonstrated."

Dr. Asam was damaged permanently in her cancer research profession by this research being blocked for almost a decade. The Miami News et al. should pay compensatory damages (general and special), aggravated damages, as well as punitive damages because the reporter, Ms. King, knowingly published the false statements attributed to Dr. Dunning in the Miami News,

> quote "...has no qualifications to do cancer research."

when Ms. King unequivocally stated she read Malignant Intrigue (R 1202) and on pp. 677-679 of Malignant Intrigue is a list of the

cancer research published by Dr. Lampkin-Asam. Also see pp. 27-28 of this brief discussing the fact Ms. King knew that Dr. Asam had qualifications to conduct cancer research; nevertheless, she published, "...has no qualifications to do cancer research."

which is "actual malice" per se.

Words in the Miami News article attributed to Dr. Dunning quoted here,

"...has no qualifications to do cancer research."

are actionable per se when Dr. Asam is a cancer scientist and published in reputable medical journals in the field of cancer (Malignant Intrigue, pp. 677-679). These actionable per se words,

"... has no qualifications to do cancer research."

are impugning the capacity or fitness of her profession. See Ideal Publishing Corp. v. Creative Features, Inc. (1977), 59 AD 2d 862, 399 NYS 2d 118, stating,

"Words charging professional incompetence are actionable per se."

Also see Capps v. Watts (1978, SC) 246 S.E. 2d 606, which states,

"Imputations of conduct or characteristics incompatible with a person's office, trade or profession are libelous and actionable without pleading special damage."

See p. 25 of this brief for direct quote from the said Miami News article and note entire quote attributed to Dr. Dunning is actionable per se. See Teare v. Local Union No. 295 of the United Association of Journeymen and Apprentices of the Plumbers, et al. 98 So 2d 79 at 80,

"In considering alleged slanderous nature of particular statements court must consider not only words used but also relationship between such words and status of individual about whom they were spoken."

"When words are actionable in themselves, or per se, they are such as necessarily import damage and malice is presumed."

Quote from Teare v. Local Union, et al., supra.

See Harwood v. Bush, Fla. 223 So 2d 359 at 360 for the definition of "libelous per se" stating,

"Publication is "libelous per se", when considered alone without innuendo, it tends to subject one to hatred,

"distrust, ridicule, contempt or disgrace or tends to injure one in his trade or profession, or if it imparts conduct, characteristics or condition incompatible with proper exercise of his lawful business, trade, profession, or office."

Therefore, there is no doubt about it that the said statements attributed to Dr. Dunning in the Miami News article, dated Oct. 23, 1973, are "libelous per se" and "actionable per se".

Quote from Oct. 23, 1973, Miami News,

"She is very emotionally disturbed, and has no qualifications to do cancer research. She may have gotten her doctorate from George Washington University, but I suspected they gave her the degree to get rid of her."

See p. 32 of this Brief showing Ms. King studied law and Ms. King should have known that the above statements published by her were "libelous per se" and false as shown on pp. 25-36 of this Brief. See Holter v. WLCY, T.V., Inc. 366 So 2d 450 stating,

"...that repetition of another's words does not release one of responsibility if the reporter knows that the words are false or inherently improbable."

Also see Goldwater v. Ginzburg, 414 F 2d 324 at 337; and St. Amant v. Thompson, 390 U.S. 727 at 732.

The Appellant is entitled to a lawsuit of libel based on the following points of law: (1) The Miami News et al. are guilty of "actual malice" (see pp. 25-36 of this Brief) as defined in New York Times Co. v. Sullivan, supra. (2) No defense of privilege applies where "actual malice" is shown. New York Times Co. v. Sullivan, supra. (3) Actual damages need neither to be found nor shown in the case of malice or "libel per se". See Saunders Hardware Five and Ten, Inc. v. Low, Fla. App. 307 So 2d 893 (1974), which states,

> "Where defamation complained of is actionable per se, punitive damages may be awarded even though amount of actual damages is neither found nor shown, for in such a case the requirement of showing of actual damages as basis of award of exemplary damages is satisfied by presumption of injury which arises from showing of libel or slander that is actionable per se." (Emphasis added.)

"...upon some proof of malicious character of publication, plaintiff may recover punitive damages the purpose ofwhich is not to compensate but rather to serve as deterrent to others inclined to commit a similar offense," id.

Not only did the Judge of the District Court of Appeal, Third District of Florida not read the record on "actual malice" as evidenced from King's deposition discussed in this brief, pp. 25-36, but also the Judge of the intermediate appellate court failed to read Malignant Intrigue, book by Appellant when the book is a key part of the record as Exhibit B (R 598-1058 of Asam's deposition). The point is that the District Court of Appeal, Third District of Florida was incorrect in the Opinion (p. a-1 of the Appendix) that the "major theme of the book entitled "Malignant Intrigue" was that Asam's professional competence as a cancer scientist had been disparaged and her mental stability questioned by people in the "cancer establishment." This false and biased

information is from p. 2 (substituted printed edition) of Brief of Appellees by Mr. Averill to the District Court of Appeal, Third District of Florida.

If the Hon. Justices from the District Court of Appeal, Third District of Florida had read the book, Malignant Intrigue, they would have seen that both sides of what was happening in the field of cancer research was presented.

See transcript from ABC program on TV 20/20 Oct. 22, 1981, special report on cancer entitled, "The War on Cancer; Cure, Profit or Politics" and note Dr. Asam was not the only cancer research doctor harassed by the so-called "cancer establishment", because of significant discoveries in the field of cancer research, (see pp. 677-679 and p. 75 of Malignant Intrigue).

Page 75 of Malignant Intrigue states, "I consider it a superb piece of work, well written, and deserving of rapid publication... I think the authors are

"to be congratulated on a truly distinguished contribution." Quote from Board of Editors, NCI, Journal of the National Cancer Institute, Jan. 24, 1958.

Dr. Asam is the original developer of the P1798 lymphomas, and this P1798 tumor is recognized as a "model lymphoma" of lymphosarcoma. (See p. 717 of book, Malignant Intrigue, quoted here),

> "Following the examination of a number of tumor systems, lymphosarcoma P1798 was selected as a potential experimental chemotherapy model for the study of remission induction and remission maintenance."

Dr. Asam also has an U.S. Patent, entitled, "Methods of Obtaining Anti-Lymphoma Antibodies." (see p. 174 of Malignant Intrigue). Yet, Ms. King published,

> "...has no qualifications to do cancer research."

Therefore, the false and misleading statement "a major theme of the book Malignant Intrigue was Asam's professional competence as a cancer scientist had been disparaged and her mental stability

questioned by people in the "cancer establishment" is incorrect and out of context as stated by Mr. Averill's Brief of Appellee p. 2 and paraphrased by the Judge from the District Court of Appeal, Third District of Florida, (p. a-1 of Appendix).

Over one million dollars has been spent on the P1798 lymphomas by the National Cancer Institute to other doctors when the original developer of the P1798 lymphomas, Dr. Asam had no grant (see pp. 618-619, and 622-623 of Malignant Intrigue).

An unsolicited and unbiased book review of Malignant Intrigue by The Book Exchange, Sardina House, Kingsway, London WCw, Aug. 1974 stated,

> "In this book Dr. Julia Lampkin-Asam tells the story of her cancer research which involved a large number of mice, and her fight to obtain assistance for its continuance. It is also the story of a very active and successful life. Illustrated by many photographs."

Therefore, it is obvious the District

Court of Appeal, Third District of Florida in their Opinion (p. a-1 of Appendix) have not read Malignant Intrigue which is part of the record as Exhibit B,R 598-1058 of Asam's Deposition.

Dr. Dunning made conflicting statements: on p. 1252 of the Dunning deposition, Dr. Dunning stated,

> "I do not recall ever saying anything to the Miami News about Dr. Asam."

yet, on p. 1391 of the Dunning Deposition after Mr. Donnellan asked the question:

> "My question is: Not if you made them but did you make them?

Dr. Dunning answered,

> "I am not sure. I do not remember the conversation."

However, Ms. King stated on p. 1153 of King's Deposition that the quote attributed to Dr. Dunning is a word for word quote. Ms. King was asked the question on p. 1153 of the record,

> "Is that a word-for-word statement statement made to you by Dr. Dunning?"

Ms. King answered; (p. 1153 of record), "It is." (Emphasis added.)

With these divergencies between the Dunning and King Depositions, and the clear and convincing evidence presented through documents and quotations from the Dunning and King depositions (pp. 25-37 of this Brief), there is no doubt about it that a jury question should have been decided by a jury and not by summary judgment. (See law cases cited pp. 22-23, and pp. 35-36 of this Brief showing "actual malice" is a jury question). Therefore, the District Court of Appeal, Third District of Florida should have remanded the case for jury trial on the "actual malice" issue after affirming that Dr. Asam was a "public figure". Further, the Supreme Court of Florida should have accepted jurisdiction concerning a federal question involving the first amendment to the U.S. Constitution concerning the "public

figure" and "actual malice" issues. Because of the Florida statute, Florida Constitution (1980), Article V, Section 3(b)(3), Dr. Asam was not allowed access to the highest state court, Supreme Court of Florida, and Dr. Asam's property rights under the Fourteenth Amendment to the U.S. Constitution have been violated because the state law (Article V, Section 3(b)(3), Florida Constitution is repugnant to the U.S. Conatitutional Amendment Fourteenth, "property rights".

The point is that Dr. Dunning either made the statements or Ms. King fabricated the statements; however, Ms. King knowingly published the false statements in The Miami News attributed to Dr. Dunning (see p. 25 of this Brief for quote). Therefore, the "actual malice" test under the New York Times Co. v. Sullivan, supra was squarely met.

To sum: The Miami News et al., owes both

compensatory and punitive damages because "actual malice" is shown (see pp. 25-36).

See p. a-15 of Appendix, that the amount of damages involved in this case is Fifteen and one-half million dollars and the damages issue should have been decided by a jury - see Miami Herald Pub. Co. v. Brown, 66 So 2d 679.

To summarize the damages:

Loss of patent development	$5,000,000.00
Loss of wages until retirement	500,000.00
Defamation	2,000,000.00
Interference with professional relationship (includes loss of grant money for cancer research	3,000,000.00
Punitive damages	5,000,000.00
Total	$15,500,000.00

See Midway Oil Co. v. Cities Service Oil Co. 49 F.R.D. 273 (1970). Quote is on next page, page 53.

"Essential to cause of action for intentional interference with business is element of "malice" or knowingly doing intentional act which violates plaintiff's rights without justification."

Also see Burnett v. National Enquirer, 7 Med. L. Rptr 1321 (1981), concerning the obvious possiblity that Ms. King fabricated the quotes attributed to Dr. Dunning in the Miami News because Dr. Dunning stated on p. 1252 of the record,

"I do not recall ever saying anything to the Miami News about Dr. Asam."

Quote from Burnett v. National Enquirer, supra, states,

"Magazine's publication, with actual malice, of libelous article that, in reporting on plaintiff's alleged conduct at restaurant, fabricated certain events, and magazine's bad faith in failing to publish adequate correction warrant award to plaintiff of $750,000 punitive damages." (Emphasis added.)

Miami News failed to retract article after notice statements were false (R. 22, Exhibit B).

If the District Court of Appeal, Third District of Florida had ruled according to the record, Dr. Asam is not a public

figure and actual malice is shown. See Buckley v. Littell, 539 F 2d 882 at 883 (1976) which states,

> "In libel case when interpretation of a communication in light of constitutional requirements is involved, reviewing court's scope of review is to examine in depth the statements in issue and the circumstances in which they are made and thus it is reviewing court's duty to reexamine the evidentiary basis of the lower court decision in the light of the constitution. U.S.C.A. Const. Amend. 1.

The problem is that the District Court of Appeal, Third District of Florida did not review the record and erroneously affirmed Dr. Asam through summary judgment to be a public figure, and further did not rule according to federal or state law (see pp. 22-23 for citations of law) to remand the case for a jury trial on the "actual malice" issue.

Because of the new Florida Statute, Florida Constitution (1980), Article V, section 3(b)(3), Dr. Asam's property rights, due process rights and equal protection under the law rights under the Fourteenth

Amendment to the U.S. Constitution have been violated since the Supreme Court of Florida did not accept jurisdiction of federal question (First Amendment case on "public figure" and "actual malice" issues).

See Turpin v. Lemon, 187 U.S. 70 at 71,

> "A law so framed that in practice it can be enforced as to the property of one person in a manner differing from its enforcement as to the property of another, giving to one person the benefit of certain protecting provisions which are or may be denied to another, denies as to that other person the equal protection of the laws."

The State of Florida through Florida Statute, Florida Constitution (1980), Art. v, sec. 3(b)(3) has abused the First Amendment rights of Dr. Asam by not considering a federal question as a matter of right but only on a discretionary basis, and in the instant case has denied jurisdiction of Dr. Asam to have access to the highest state court (Supreme Court of Florida) to decide a federal question under the First Amendment to the U.S. Constitution. Therefore,

Dr. Asam has not had equal protection under the law as guaranteed by the Fourteenth Amendment to the U.S. Constitution because the new Florida Statute, Florida Constitution (1980), Article V, sec. 3(b)(3) is repugnant to the Federal Constitution.

Since the state law, Florida Constitution (1980), Article V, section 3(b)(3) is repugnant to the Federal Constitution, The Supreme Court of the United States should take jurisdiction under 28 U.S.C. section 1257 (2) and 28 U.S.C. section 2106.

CONCLUSION

For the above reasons, the new Florida Statute, Florida Constitution, Art. V, sec. 3(b)(3) is repugnant to the Federal Constitution (1st, 5th, 6th and 14th Amendments-due process, property and equal protection under the law rights). The Supreme Court of the United States should take jurisdiction under 28 U.S.C. sec. 1257(2), 28 U.S.C. sec. 2106, 42 U.S.C. sec. 1983, and 28 U.S.C.sec. 1343(3). The following issues should be considered; whether Dr. Asam is a public figure; whether actual malice is a jury question; whether clear and convincing actual malice is shown; whether the Miami News' statements, impugning the capacity and fitness of Dr. Asam's profession, were "libelous per se,", and whether damages are due Dr. Asam. The Summary Judgment should be reversed.

As an alternative, the case should be remanded to the lower court for a jury trial on the "actual malice" and damages issues.

Respectfully submitted,

Julia McCain Lampkin-Asam

Julia McCain Lampkin-Asam, Ph.D.
Appellant, Pro Se
2243 Gorham Ave.
Ft. Myers, Florida 33907

PERMISSION TO PRESENT ORAL ARGUMENT AND WRITE MERITS BRIEF REQUESTED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by certified mail to Hon. Robert Graham, Governor of the State of Florida, The Capitol, Tallahassee, Florida; Hon. Jim Smith, Attorney General, State of Florida, The Capitol, Tallahassee, Florida: Mr. Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301; Mr. Louis J. Spallone, Clerk, District Court of Appeal, Third District, 2001 S.W. 117 Ave., Miami, Florida 33165; Mr. Richard P. Brinker, Clerk, Circuit Court, Eleventh Judicial Circuit in and for Dade County, Dade County Courthouse, 73 West Flagler St., Miami, Florida 33130; and Mr. Joseph P. Averill, Attorney, representing the Miami News et al. 1237 City National Bank Building, 25 West Flagler St., Miami, Florida 33130 this 3rd day of August 1982.

By: Julia McCain Lampkin-Asam

Julia McCain Lampkin-Asam, Ph.D.

Exhibit A

"Not Final Until Time Expires
To File Rehearing Motion
And, if Filed, Disposed of.

"IN THE DISTRICT COURT OF APPEAL OF

FLORIDA THIRD DISTRICT

JULY TERM, A.D. 1981

Case no. 80-2053

JULIA McCAIN LAMPKIN-ASAM,
Appellant,

vs.

MIAMI DAILY NEWS, INC., a Florida corporation, d/b/a/ The Miami News, and TIMOTHY JOHNSON, as personal representative of the late TERRY JOHNSON KING,
Appellees.

"Opinion filed December 29, 1981.

"An Appeal from the Circuit Court for Dade County, Dan Satin, Judge.

Joel V. Lumer, for appellant.

Joseph P. Averill, for appellees.

"Before BARKDULL, BASKIN and PEARSON, DANIEL, JJ.

"PEARSON, DANIEL, judge.

"Julia McCain Lampkin-Asam, the plaintiff below, wrote a book describing the events which, in Asam's view, had precluded her from receiving research grants for almost a decade and developing a cure for cancer. A major theme of the book, entitled "Malignant Intrigue," was that Asam's professional competence as a cancer scientist had

"been disparaged and her mental stability questioned by people in the "cancer establishment." Asam's book identified one Dr. Wilhelmina Dunning, her former supervisor, as the primary villain whose

Exhibit A (continued)

"statements concerning Asam had contagiously spread through the cancer research community so as to create, as the plaintiff's title aptly put it, a malignant intrigue."

"In 1973, Asam, wanting to draw public attention to her research and need for research funds, brought her 753-page book to the attention of The Miami News. The late Mrs. Terry Johnson King, then Lifestyle Editor of the News, interviewed Asam and decided to write a column about "Malignant Intrigue" and its author. King read the book and concluded that it was a rather vitriolic attack on Dr. Dunning. King decided to get Dunning's side of the story before writing her column and interviewed Dunning on the phone. King then wrote the column, which, overall, was an unflattering evaluation of the plaintiff's malignant intrigue theory. The column included a quote about Asam attributed to Dunning:[1]

"To which the highly respected Dr. Dunning says, 'She (Asam) is very emotionally disturbed, and has no qualifications to do cancer research. She may have gotten her doctorate from George Washington University, but I suspect they gave her the degree to get rid of her.' "

Page 3 80-2053

"Asam then sued Dunning,[2] The Miami News, and Mrs. King alleging defamation. From a summary judgment entered in favor of The Miami News and the estate of Mrs. King, Asam appeals.

"We affirm the summary judgment. The determination that a person is a public figure is properly for the court. Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669, 15 L.Ed.2d 597 (1966); Gadsden County Times, Incorporated v. Horne, 382 So. 2d 347 (Fla. 1st DCA 1980); Belli v.

Exhibit A (continued)

"Orlando Daily Newspapers, Inc., 389 F.2d 579 (5th Cir. 1968); Logan v. District of Columbia, 447 F.Supp.1328 (D.D.C. 1978); Hoffman v. Washington Post Co., 433 F.Supp. 600 (D.D.C. 1977), aff'd, 578 F.2d 442 (D.C. Cir. 1978). Asam's efforts to arouse public indignation and influence the allocation of public funds, Gibson v. Maloney, 231 So.2d 823 (Fla. 1970), second appeal, 263 So.2d 632 (Fla. 1st DCA 1972); Murphy v. Daytona Beach Humane Society, Inc., 176 So.2d922 (Fla. 1st DCA 1965); participation in public debates on public health matters, Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F. 2d 932 (2d Cir.), cert. denied, U.S. , 101 S.Ct. 117, L.Ed.2d (1980); Exner v. American Medical Association, 12 Wash. App. 215, 529 P.2d 863 (1974); publication and distribution of the autobiographical "Malignant Intrigue" and other writings, lectures and speeches, and efforts to seek substantial publicity, including the very publicity which is the subject matter of this action, Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), cert. denied sub nom. Hotchner v. Doubleday & Company, Inc., 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95 (1977); Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976); Guitar v. Westinghouse Electric Corporation, 396 F.Supp. 1042 (S.D.N.Y. 1975), among other things, aggregately show her, as a matter of law, to be a public figure. Wolston v. Reader's Digest Association, Inc., 443 U.S. 157, 99 S.Ct. 2071, 61 L.Ed.2d 450 (1979); Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed. 2d 411 (1979).

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"Asam's status as a public figure requires her to establish that the newspaper and Mrs. King acted with actual malice in

Exhibit A (continued)

"the constitutional sense, Curtis Publishing Company v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L.Ed.2d 1094 (1967), that is, the publication involved was deliberately falsified or published recklessly despite the publisher's awareness of probable falsity, New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 696 (1964); Gibson v. Maloney, supra. Viewing the evidence most favorable to the plaintiff, to determine whether there exists a genuine issue of material fact upon which a reasonable jury could find with convincing clarity that the defendants acted with such actual malice,[3] we find absolutely no clear and convincing evidence that the defendants knew that the information published was incorrect or that the defendants had any degree, much less a high degree, of awareness of the probable falsity of this information. See Long v. Arcell, 618 F.2d 1145 (5th Cir. 1980).

"Mrs. King's testimony in her deposition is, unequivocally, that she accurately quoted Dr. Dunning. On the other hand, Dunning's testimony is that she was "not sure" if she made the statements.

Page 5 80-2053

"Dunning doubted that she would remember the contents of a conversation which took place years before. While she did not recall the conversation with Mrs. King, she admitted some recollection of the book being reviewed, and because"...I had been maligned in the book, she might have contacted me to find out if the statements were true." Dunning believed she was "misquoted," because she would not have said those things "in that form." She admitted that responses could possibly have been drawn from her in a succession of questions which could account for the eventual

Exhibit A (continued)

"form of the statement attributed to her. Apart from whether she revealed it to Mrs. King during the telephone interview, it was, in fact, Dunning's opinion that George Washington University might have given Asam her degree to get rid of her. Dunning admitted she could have said that the plaintiff was "not qualified to do independent cancer research." But most significantly, Dunning said that if she made the remarks attributed to her by Mrs. King, she made them facetiously and did not "grant permission to anybody to publish such a facetious remark."

"In Long v. Arcell, supra, the Fifth Circuit affirmed a judgment notwithstanding a jury verdict of compensatory and punitive damages in favor of a defamation plaintiff. The litigation was prompted by the newspaper article which stated that an ambulance service may have violated the law by operating without a license from the State Board of Health. The reporter testified that he was told by two Board of Health employees that the ambulance service had not been licensed. At trial, one Board of Health employee directly contradicted the reporter's testimony, saying that he told the reporter that the ambulance service was licensed to operate. Moreover, the ambulance service's lawyer asserted that, on the day before publication, he read the reporter a letter from the other Board of Health employee which stated that the ambulance service was authorized to operate. The Fifth Circuit held, 618 F. 2d at 1148-49:

"The plaintiff's' case rested almost entirely upon the testimony of Bradshaw (a Board of Health employee) and Wilson (the attorney for the ambulance service). Theirs was the only testimony relating directly to the defendant's state of mind.

Exhibit A (continued)
"There was no documentary evidence which showed that the defendants knew their article was false or enter-

Page 6 80-2053
"tained serious doubts about its accuracy.[4] In sum, the jury was left to decide the case based on the conflicting accounts of the conversations described above. If the applicable burden of proof had been a preponderance of the evidence, a jury verdict either way would have to stand. Similarly, if liability could be imposed on a clear and convincing showing of negligence, we would be hard pressed to disregard the jury's verdict. We repeat, however, that the plaintiff's burden was to prove actual malice by clear and convincing evidence that the defendants knew that their information was incorrect or had a 'high degree of awareness of ... (its) probable falsity.' (citation omitted).

"Although the Constitution neither condones nor encourages careless journalistic practicies, the journalist who merely is careless may not be held liable for defaming a public figure. That is because the interests we must consider in libel cases are not only those of the defamed and the defamer. If they were, the former would prevail with a greater degree of frequency. In all libel suits between a public figure and a publisher the public intervenes as a matter of right, and its interest must be considered. Only by limiting liability to those situations in which the publisher has acted with actual malice do we fully protect the public's right to the benefits of a free and uncensored press."

"Where, as in the present case, the person to whom the quoted words are attributed has not unequivocally denied making

Exhibit A (continued)
"the statement attributed to her; has denied only the form, but not the substance, so as not to rule out the possibility that she was mistakenly, but immaterially, misquoted; and has indeed allowed that she may have actually made the statements "facetiously"; the requisite high standard of proof is simply not met.[5] In re McDonough, supra ("that high standard of proof usually would require more than one man's word against another, especially where, as here, mistake can not be ruled out.").

Page 7 80-2053
"Out holding makes it unnecessary to consider the other contentions made by the appellees in support of the summary judgments, and we expressly do not rule upon them.
"Affirmed."
"[1]The column also characterized the charges made by Asam in her book as "almost paranoical." Since we find King's characterization to be an expression of opinion based on facts set forth in the column, it is, in our view, entitled to absolute constitutional protection. From v. Tallahaassee Democrat, Inc., 400 So.2d 52 (Fla. 1st DCA 1981). In Gertz v. Robert Welch, Inc., 418 U.S. 323, 229-340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Supreme Court said:
"(U)nder the First Amendment, there is no such thing as a false idea. However pernicious an opinion might seem, we depend upon its correction not on the conscience of judges or juries but on the competition of other ideas."
"See also Palm Beach Newspapers, Inc. v. Early, 334 So.2d 50 (Fla. 4th DCA 1976); Hotchner v. Castillo-Puche,551 F.2d 910

Exhibit A (continued)

"(2d Cir.), cert. denied sub nom. Hotchner v. Doubleday & Company, Inc., 434 U.S. 834 98 S.Ct. 120, 54 L.Ed.2d 95 (1977); Loeb v. Globe Newspaper Co., 489 F. Supp. 481 (D. Mass. 1980). Therefore, we devote the remainder of this opinion to the Dunning statement.

"[2]Dunning was earlier favored with a summary judgment. Asam's appeal from the judgment was dismissed by this court as untimely filed. Asam unsuccessfully sought relief in the Florida Supreme Court from this dismissal. Lampkin-Asam, v. District Court of Appeal, 364 So2d 469 (Fla. 1978).

"[3]This is the well-accepted test for evaluating the propriety of a summary judgment in a defamation case where actual malice in the constitutional sense must be shown. See Yiamouyiannis v. Consumers Union of the United States, Inc., supra; Long v. Arcell, 618 F.2d 1145 (5th Cir. 1980); Hahn v. Sargent, 523 F.2d 461 (1st Cir.), cert. denied, 424 U.S. 904, 96 S Ct.1495, 47 L.Ed. 2d 754 (1976); Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F. 2d 438, (9th Cir.), cert. denied, 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed.2d 111 (1974); Nader v. deToledano, 408 A.2d 31 (D.C. App. 1979), cert. denied, 444 U.S. 1078, S.Ct. , L.Ed. 2d (1980); National Association of Government Employees, Inc. v. Central Broadcasting Corp., 396 N.E. 2d 996 (1979), cert. denied, 440 U.S. 935, S.Ct. , L.Ed.2d (1980); In re McDonough, 296 N.W. 2d 648 (Minn. 1980); Brophy v. Philadelphia Newspapers, Inc., Pa Super. Ct. ,422 A 2d 625 (1980). The standard (convincing clarity, not preponderance) against which the evidence is examined is dictated by New York Times v. Sullivan, supra; but the manner of examining the evidence (viewing it most favorably for the non-moving

Exhibit A (continued)
"party) in light of the standard is the same as in all summary judgment cases. See Guam Federation of Teachers, Local 1581 v. Ysrael, supra. Compare Wasserman v. Time, Inc. 424 F.2d 920, 922-23 (D.C. Cir.)(Wright, J., concurring), cert. denied 398 U.S. 940, 90 S.Ct. 1844, 26 L.Ed. 2d 273 (1970). See generally Comment, The Propriety of Granting Summary Judgment for Defendants in Defamation Suits Involving Actual Malice, 26 Vill. L. Rev. 470 (1981).

"[4] A plaintiff claiming defamation now has access into the editorial process to procure evidence bearing on the element of actual malice. Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Such a plaintiff may even discover the identity of confidential sources. Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980).

"[5] We note also that the theory of the plaintiff's action against Dr. Dunning was that Dunning told Mrs. King exactly what was printed and that Dunning had lied. When the plaintiff lost that action, she shifted gears and said that Dunning never said these things, and the newspaper fabricated the statement. Dunning's testimony is even more suspect considering that it was given when Dunning was a defendant facing a defamation action."

Exhibit B

"IN THE DISTRICT COURT OF APPEAL OF

FLORIDA THIRD DISTRICT

JANUARY TERM, A.D. 1982

WEDNESDAY, JANUARY 27, 1982

Case no.
80-2053

JULIA McCAIN LAMPKIN-ASAM, Ph.D.
Appellant,

vs.

MIAMI DAILY NEWS, INC., ETC.,
Appellees.

"Appellant, in proper person having filed in this cause motion for rehearing and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied."
"A True Copy ATTEST:
LOUIS J. SPALLONE
Clerk District Court of
Appeal, Third District
By: s/ Evelyn A. Hulmin, Deputy Clerk
cc:Julia McCain Lampkin Asam
Joseph P. Averill
/dp"

Exhibit C

"SUPREME COURT OF FLORIDA

Monday, June 7, 1982

Case no. 61,784

District Court of Appeal 3d District
no. 80-2053
JULIA McCAIN LAMPKIN-ASAM, Ph.D.,
Petitioner,
v.
MIAMI DAILY NEWS, INC., etc., et al.
Respondents.

"This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

"No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)."

"ADKINS, Acting C.J., BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur"

"A True Copy TEST:
Sid J. White
Clerk Supreme Court
By: Dulilire Causseaux, Deputy Clerk"

TC

cc: Hon. Louis J. Spallone, Clerk
Hon. Dan Satin, Judge
Hon. Richard P. Brinker, Clerk
Julia McCain Lampkin-Asam, Ph.D.
Joseph P. Averill, Esquire"

Exhibit D

"IN THE DISTRICT COURT OF APPEAL TO THE THIRD DISTRICT OF FLORIDA"

Case No. 80-2053

"NOTICE TO INVOKE DISCRETIONARY JURISDICTION"

JULIA McCAIN LAMPKIN-ASAM, Ph.D.
Plaintiff, Appellant, Petitioner
vs.
MIAMI DAILY NEWS, INC., a Florida Corporation, d/b/a/ The Miami News, and TIMOTHY JOHNSON, as personal representative of the late TERRY JOHNSON KING,
Defendants, Appellees, Respondents"

"NOTICE IS GIVEN that Julia McCain Lampkin-Asam, Ph.D., Plaintiff, Appellant, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered December 29, 1981 (Seven-page opinion filed December 29, 1981); rehearing denied on January 27, 1982.

"The decision (1) expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law,and (2) expressly construes a provision of the state or federal constitution."

"Respectfully submitted,
s/ Julia McCain Lampkin Asam
Julia McCain Lampkin-Asam, Ph.D.,
Pro Se
Plaintiff, Appellant, Petitioner
2243 Gorham Ave.
Ft. Myers, Florida 33907

"CERTIFICATE OF SERVICE"

"I HEREBY CERTIFY that a true and correct copy of the foregoing Notice to Invoke Discretionary Jurisdiction was sent by mail this 18th day of February, 1982 to Mr. Joseph Averill, ..."

By: s/ Julia McCain Lampkin Asam

Exhibit E

"IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA"
"GENERAL JURISDICTION DIVISION

NOTICE OF APPEAL
Original filed
Oct. 23rd 1980

Case no.
75-32943 CA 23

JULIA McCAIN LAMPKIN-ASAM, Ph.D.
Plaintiff
vs.
MIAMI DAILY NEWS, INC., a Florida Corporation, d/b/a/ The Miami News and TIMOTHY JOHNSON, as personal representative of the late TERRY JOHNSON KING.
Defendants

"Julia McCain Lampkin-Asam, Ph.D., Plaintiff, takes and enters her appeal to the District Court of Appeal, Third District, State of Florida, to review the "Summary Final Judgment" in favor of Defendants of the Eleventh Judicial Circuit Court for Dade County, bearing date the 8th day of October 1980. The nature of the order appealed from is the "Summary Final Judgment".

"All parties to said cause are called upon to take notice of the entry of this appeal.

REASONS FOR APPEAL

"1. Hon. Judge Dan Satin, Circuit Court Judge, has made in his "Summary Final Judgment" and Order on the Public Figure issue, numerous errors in law and fact concerning the issue of the Plaintiff being a public figure and show "actual malice". These errors in law and fact on the public figure issue and actual

Exhibit E (continued)
"malice issue will be discussed in the Initial Appellant Brief to be filed later. Plaintiff is not a public figure.

"2. Further, <u>according to the record</u>, Terry Johnson King and Wilhelmina Francis Dunning both showed"actual malice" in the constitutional sense. The issue on actual malice and the law will be discussed in the Initial Appellant Brief.

"3. <u>Genuine issues of material fact</u> existed in this libel case since Dr. Wilhelmina F. Dunning claimed she did not talk to a Miami News reporter about Dr. Asam.

"Quote from record of deposition Dec. 21, 1977 of Dr. Dunning,

Dr. Dunning stated, "I do not recall ever saying anything to The Miami News about Dr. Asam." (from p. 26).
Terry Johnson King, The Miami News reporter, claimed the quote attributed to Dr. Dunning was made by Dr. Dunning.

"Quote from record of deposition Nov. 4, 1977 of Terry Johnson King (Mr. Donnellan) "Mrs. King, I refer" (from p. 40) (and continued on p. 41), "you to the third paragraph in the last column of the article, and specifically to the statement enclosed in the quotation marks reading, (continued on 2nd page of Notice of Appeal)"
Page 2 75-32943 Notice of Appeal

"She is very emotionally disturbed, and has no qualifications to do cancer research. She may have gotten her doctorate from the George Washington University, but I suspect they gave her the degree to get rid of her."

Donnellan continued on p. 41.

"Is that a word-for-word statement made to you Dr. Dunning?" King answered: "<u>It is</u>." (Emphasis added.)

Exhibit E (Continued)

"According to these two statements quoted above from the record, the possibility exists, that Ms. King fabricated the quote attributed to Dr. Dunning therefore, the "Summary Final Judgment" should be reversed.

"WHEREFORE, the Plaintiff, Julia McCain Lampkin-Asam, Ph.D. demands judgment against defendants, The Miami News et al. in the sum of Fifteen and one-half million dollars and no/100 ($15,500,000.00), interests, costs, and any future attorney fees. Dated 22 October 1980.

Respectfully submitted,
s/ Julia McCain Lampkin Asam
Julia McCain Lampkin-Asam, Ph.D.
Representing self in Appeal
2243 Gorham Ave.
Ft. Myers, Florida 33907

"CERTIFICATE OF SERVICE"

"I HEREBY CERTIFY that a true copy of the foregoing "Notice of Appeal" was this 22nd day October 1980 mailed to Mr. Richard P. Brinker, Clerk, Circuit Court Dade County, Room 137, 73 West Flagler St., Miami, Florida 33130; mailed by certified mail to Mr. Joseph P. Averill, Attorney for Defendants, The Miami News and Ms. King, 1237 City National Bank Building, 25 West Flagler Street, Miami Florida 33130; and Mr. Saul T. Von Zamft and Ms. Robin Gluck, attorneys for Plaintiff in Circuit Court, Gables I Tower, Suite 850, 1320 South Dixie Highway, Coral Gables, Florida 33146.

By: s/ Julia McCain Lampkin Asam"

Exhibit F

"IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO. 75-32943 CA 23

JULIA McCAIN LAMPKIN-ASAM,
Plaintiff,
vs.
MIAMI DAILY NEWS, INC., A Florida corporation, d/b/a/ THE MIAMI NEWS, and TIMOTHY JOHNSON, as personal representative of the late TERRY JOHNSON KING,
Defendants

"SUMMARY FINAL JUDGMENT

"This is a libel action. Plaintiff is a "cancer scientist" who has written an autobiography, "Malignant Intrigue". That autobiography describes Plaintiff's efforts to find a cure for cancer and to secure, from governmental and philanthropic entities, financing for her proposed research. Statements made in an article which had as its focus the Plaintiff's autobiography prompted this litigation. By prior order, the Court has ruled that the Plaintiff is, for purposes of this proceeding, a "public figure".

"Having determined the Plaintiff to be a "public figure", the Court scheduled oral argument, as a part of the pre-trial conference, on the question of whether, on this record, Plaintiff is able to demonstrate the existence of "actual malice" in the constitutional sense. The Court holds that, on this record, the Plaintiff will be unable to demonstrate "actual malice" in the constitutional sense and that the Defendants are entitled to Summary Final Judgment.

"In New York Times v. Sullivan, 377 U.S. 256, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)

Exhibit F (continued)
"and its progeny, the United States Supreme Court has imposed upon a "public figure" libel plaintiff, the burden of proving, by clear and convincing evidence, "actual malice"

Page 2 Summary Final Judgment 75-32943
"in the constitutional sense. This burden is an onerous one indeed. A review of the cases reveals that a "public figure" libel plaintiff must show that the offending publication was made with guilty knowledge of its actual or probable falsity. In New York Times v. Sullivan, supra. the Supreme Court defined "actual malice" as publication of material "with knowledge that it was false or with reckless disregard of whether it was false or not". To satisfy the "reckless disregard" option, plaintiff's evidence must establish, with convincing clarity, that the defendants either;

"a. "Entertained serious doubts as to the truth of the publication" (St. Amant v. Thompson, 390 U.S. 727, 20 L.Ed. 2d 262, 88 S.Ct. 1323 (1968); or,

"b. "Possessed a high degree of awareness of their probable falsity" (Garrison v. Louisiana, 79 U.S. 64, 13 L.Ed. 2d 125, 85 S.Ct. 209(1964).

"As the term has been developed by the United States Supreme Court "actual malice" in the constitutional sense is a subjective test which turns upon the author's state of mind concerning the truth or falsity of the statements made. Herbert v. Lando, 441 U.S. 153, 60 L.Ed. 2d 115, 99 S.Ct. 1635 (1979). The use by the Supreme Court of the term "actual malice" to characterize this subjective standard has created a good deal of

Exhibit F (continued)
"confusion, largely due to the similarity in the name of the constitutionally mandated test of "actual malice" and the former test of "express malice", which was developed in common law libel actions prior to New York Times v. Sullivan, supra. In Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341, 1349-1350, (S.D.N.Y. 1977) Judge Brieant says:

> "Although these definitions distort common English, they must be taken at face value. In the context of a libel suit, "actual malice" simply does not mean ill-will or spite. Rather, "malice" must be taken to mean fraudulent, knowing publication of a falsehood, or reckless disregard of falsity. And we note that reckless does not mean grossly negligent, its common use, but rather intentional disregard. When the Supreme Court uses a word, it means what the Supreme Court wants it to mean. "Actual malice" is now a term of art having nothing to do with actual malice.

"In short, "actual malice", in the constitutional sense turns upon the publisher's state of mind toward the truth or falsity of the statements made.

Page 3 Summary Final Judgment 75-32943
"On this record, there is no competent evidence to support a conclusion that the publication in question resulted from "actual malice" in the constitutional sense. Statements in the published article which have prompted this action fall into two categories; Firstly, comments, attributed to Dr. Dunning, a cancer researcher, who formerly supervised Plaintiff's work at the University of Miami and secondly, comments in the article about the accusations made in the Plaintiff's auto-

Exhibit F (continued)
"biography "MALIGNANT INTRIGUE". The comments attributed in the newspaper article to Plaintiff's former supervisor mirror those attributed to Plaintiff's former supervisor by Plaintiff in her autobiography. The author of the article, now deceased, testified that the statements attributed to Plaintiff's former supervisor were made during the course of a telephone interview which followed an interview of the Plaintiff and a reading of Plaintiff's autobiography. The former supervisor's testimony cannot be construed to stand for a flat denial of any conversation in 1973 between herself and the late author of the newspaper article. The former supervisor's testimony was that she could recall absolutely no telephone conversation with anyone in 1973 and that she could not recall any conversation with the newspaper writer of the published article. The former supervisor testified that she did not make statements attributed in the newspaper article to her "in that form", adding that, if she had made the statements, she made them "facetiously" and not intending them for publication. In sum, the former supervisor's testimony is that she was misquoted. While a jury could be entitled to resolve these factual disputes in favor of the Plaintiff, such a resolution would not permit a finding of "actual malice" in the constitutional sense. As the First District noted in deciding Gibson v. Maloney, 263 So. 2d 632, 636-37 (Fla. 1st DCA 1972):

> "Actual malice in a libel action is more than mere negligent error. The Plaintiff must prove that the publication involved was deliberately falsified or published recklessly despite publisher's awareness of probable falsity."

Exhibit F (continued)
"Here, the evidence might permit a finding of negligence. But it would not permit a finding of "actual malice" in the constitutional sense. Herbert v. Lando, supra; Gertz v. Robert Welch, Inc., 418 U.S. 323, 14 L.Ed. 2d 789, 94 S Ct. 2997 (1974); Voelker v. Combined Ins. Co. of America, 73 So. 2d 403 (Fla. 1954). On this basis alone, Defendants are entitled to summary judgment.

"But there is more. In a sense, all this ignores the conclusive effect of the Plaintiff's response to Request for Admission, sworn to by Plaintiff on November 23, 1979 and served by Plaintiff's counsel on December 14, 1979. As a result of this response, Plaintiff has admitted, for purposes of this litigation, that her former supervisor made the statements attributed to her in the newspaper article. In the context of an article dealing with the Plaintiff's autobiography, wherein Plaintiff castigated the former supervisor for allegedly having made similar statements in the past, such admissions compel summary judgment. Edwards v. National Audobon Society, Inc., 516 F. 2d 113 (2nd Cir. 1977).

"As to the remaining statements, statements by the author of the newspaper article which commented upon Plaintiff's autobiography and her charges, the Court finds that such expressions of opinion are constitutionally protected. Gertz v. Robert Welch, Inc., supra, Coleman v. Collins, 384 So. 2d 229 (Fla. 5th DCA 1980); Palm Beach Newspapers, Inc. v. Early, 334 So 2d 50 (Fla. 4th DCA 1976). Even under the common law, without regard to the constitutional protections, summary judgment would be in order. When an author submits his work to the public, "he (is) bound to

Exhibit F

expect, with equal equanimity, praise or blame directed at the work itself." Berg v. Printers' Publishing Co., 54 F. Supp. 795, 797 (S.D.N.Y. 1943). To defeat this common law privilege, Plaintiff must show that the author of the newspaper article was animated to "express malice", -- i.e., spite, ill-will, intention to defame or the like. Abram v. Odham, 89 So. 2d 334 (Fla. 1956); Coogler v. Rhodes, 38 Fla. 240, 29 So. 109 (1897). Here, the record is bereft of evidence to support the notion that the author of the newspaper article was animated by any ill-will or intent to injury the Plaintiff.

"Defendants are clearly entitled to summary final judgment, which is hereby granted. It is adjudged that the Plaintiff, Julia McCain Lampkin-Asam, take nothing by this action and that the Defendants, Miami Daily News, Inc., a Florida corporation d/b/a/ The Miami News, and Timothy Johnson, as personal representative of the late Terry Johnson King, go hence without day. Costs, to the extent such are permitted by law, shall be taxed by separate order and jurisdiction is reserved for this purpose.

"ORDERED at Miami, Dade County, Florida, this 8th day of October, 1980.

s/ Dan Satin

DAN SATIN, Circuit Judge

Copies furnished:
Joseph P. Averill, Esq. - Counsel for Miami Daily News, Inc.
Saul Von Zamft, esq., and Robin B. Gluck, Esq. - Counsel for Plaintiff.

Exhibit G

"IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 75-32943 (23)

JULIA McCAIN LAMPKIN-ASAM,
Plaintiff,

vs.

WILHELMINA FRANCIS DUNNING, TERRY JOHNSON KING and MIAMI DAILY NEWS, INC., a Florida corporation d/b/a THE MIAMI NEWS.
Defendants.

"ORDER DENYING MOTION OF DEFENDANTS, TERRY JOHNSON KING AND THE MIAMI NEWS"

"THE ABOVE ENTITLED CAUSE came on to be heard before the undersigned Judge on the Motion of the Defendants, TERRY JOHNSON KING and MIAMI DAILY NEWS, INC., a Florida corporation d/b/a THE MIAMI NEWS. The Court has reviewed the record, heard argument of counsel and reviewed the memorandums submitted by counsel for the respective parties and being otherwise fully advised in the premises, it is accordingly

"ORDERED AND ADJUDGED that the Motion of the Defendants, TERRY JOHNSON KING and MIAMI DAILY NEWS, INC., a Florida corporation d/b/a THE MIAMI NEWS, be and the same is hereby denied.

"DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 8 day of March, 1978.

s/ Dan Satin
CIRCUIT JUDGE

"Copies to:
J. James Donnellan, III, ESQ.
S. Harold Skolnick, ESQ.
Joseph P. Averill, ESQ.
(The above is in the record p. 1473).
(See record pp. 1108-1109, Motion of Miami Daily News, Inc., ... for Summary Judgment dated Dec. 9, 1977.)(See Record p. 1483, Order Denying Petition for Reconsideration).

Exhibit H

"IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
Case no. 75-32943 (23)

JULIA McCAIN LAMPKIN-ASAM,
Plaintiff,
vs.
WILHELMINA FRANCIS DUNNING, TERRY JOHNSON KING and MIAMI DAILY NEWS, INC., a Florida corporation d/b/a/ THE MIAMI NEWS,
Defendants,

"ORDER DENYING PETITION FOR RECONSIDERATION

"THE ABOVE ENTITLED CAUSE came on to be heard before me on the Petition of TERRY JOHNSON KING and THE MIAMI NEWS for reconsideration of the ORDER DENYING MOTION OF THE DEFENDANTS FOR SUMMARY FINAL JUDGMENT. The Court has considered said Petition, heard argument of counsel and reviewed again the authorities relied upon and being further fully advised in the premises, it is accordingly

"CONSIDERED, ORDERED AND ADJUDGED that the Petition for Reconsideration of the Order denying the motion of the Defendants, TERRY JOHNSON KING and THE MIAMI NEWS, for Summary Final Judgment be and the same is hereby denied.

"DONE AND ORDERED at Miami, Dade County, Florida this 26 day of July, 1978.

s/ Dan Satin
CIRCUIT JUDGE

"Copies to:
J. JAMES DONNELLAN, III, ESQ.
S. HAROLD SKOLNICK, ESQ.
JOSEPH P. AVERILL, ESQ.
TIMOTHY A. JOHNSON, JR.,
(Record p. 1483).

Exhibit I
(Filed June 25, 1982)

"IN THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

"District Court of Appeal
Third District no. 80-2053
"Supreme Court of Florida
no. 61,784
"Circuit Court, Eleventh Judicial
Circuit in and for Dade County,
Florida no. 75-32943, General
Jurisdiction Division

JULIA McCAIN LAMPKIN-ASAM, Ph.D.
Appellant

vs.

DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA; SUPREME COURT OF FLORIDA; STATE OF FLORIDA; MIAMI DAILY NEWS, INC., a Florida Corporation, d/b/a/ The Miami News, and Timothy Johns, as personal representative of the late Terry Johnson King
Appellees

"NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

"NOTICE IS HEREBY GIVEN that Julia McCain Lampkin-Asam, Ph.D., Appellant (Plaintiff, Appellant, Petitioner below) hereby appeals to The Supreme Court of the United States the final judgment of this District Court of Appeal, Third District rendered December 29, 1981 (Seven-page opinion filed December 29, 1981); rehearing denied on January 27, 1982; and jurisdiction denied by the Supreme Court of Florida June 7, 1982 based on Florida Constitution (1980) Article V Section 3(b)(3), now making the District Court of Appeal, Third District of Florida, the highest court to review the merits of a case in the state of Florida.

"This appeal to The Supreme Court of the United States is taken pursuant to Title 28, United States Code, Section 1257(2),

Exhibit I (continued)
"28 United States Code, Section 2106, 28 United States Code, Section 1343(3) and 42 United States Code, Section 1983, as well as the First, Sixth and Fourteenth Amendments to the U.S. Constitution.

"The new Florida Statute, Article 5, section 3(b)(3), (Florida Constitution), prevents a case concerning the First Amendment to the U.S. Constitution from the District Court of Appeal, Third District, from being considered in the Supreme Court of Florida, thus, violating the constitutional right of the Appellant to have "due process" and

"equal protection under the law. This Florida Statute, Article 5, section 3(b)(3) (Florida Constitution) is repugnant to the U.S. Constitution, Fourteenth Amendment.

"The Appellants rights have been violated by the Florida Statute since the District Court of Appeal, Third District, affirmed a Summary Judgment incorrectly showing Dr. Lampkin-Asam to be a public figure and deciding the issue of "actual malice" by summary judgment instead of by a jury as indicated by Florida law, thus the District Court of Appeal, Third District of Florida did violate Dr. Lampkin-Asam's rights under the Sixth Amendment to the U.S. Constitution to have a First Amendment to the U.S. Constitution issue of "actual malice" decided by a jury, i.e. the District Court of Appeal, Third District of Florida failed to remand the instant case to the circuit court for a jury trial on the "actual malice" issue when the record clearly shows that both the reporter, Terry Johnson King from the Miami News, and Dr. Wilhelmina Francis Dunning (a Ph.D.) knew before the publication of the statements attributed to Dr. Dunning in the Miami News Oct. 23, 1973 were false and

Exhibit I (continued)
"defamatory. The instant case has never been tried by a jury.

"See Gadsden County Times, Inc. v. Horne, 382 So 2d 347 (Fla. 1st DCA 1980) at 347 which states,

"In libel action, determination of plaintiff's status as a "public figure" or "private person" is one for trial judge to make, while issues of "actual malice" or negligence are ordinarily jury issues. (Emphasis added.)

"It is to be pointed out that the First District Court of Appeal has said that in these cases summary judgment should be used sparingly so as not to infringe on the constitutional right to a jury trial. Axlerod v. Califano, 357 So 2d 1048, (Fla. 1st DCA 1978). The Second District Court of Appeal has reversed a directed verdict for the defense and ruled that the question of actual malice is for the jury. Holter v. WLCY, T.V., Inc., 366 So 2d 445, 450, (Fla. 2d DCA 1979).

Page 3 Notice of Appeal to the Supreme Court of the United States

"The U.S. Supreme Court has noted that proof of "actual malice" calls a defendant's state of mind into question and does not readily lend itself to summary disposition. (See Hutchinson v. Proxmire, 443 U.S. 111, 120 at fn. 9 (1979).

"The New York Times Co. v. Sullivan (1964) 376 U.S. 254 clearly states that the actual malice requirement is fully met under either of the following two circumstances; First, that the statement was made with knowledge that it was false, or second, that the statement was made with reckless disregard of whether it was false or not. The point is that not only is the "actual malice" shown in the record but the exact pages of the "actual malice" were pointed

Exhibit I (continued)
"out to the District Court of Appeal, Third District, Jan. 5, 1982 in the "Motion and Petition for Rehearing" containing 24 pages and 19 exhibits showing clear and convincing evidence of "actual malice" by both Dr. Dunning and Ms. King. The District Court of Appeal, Third District, completely ignored the record showing "actual malice" and denied the rehearing and the District Court of Appeal, Third District violated Dr. Lampkin-Asam's rights under the Sixth Amendment to the U.S. Constitution to have a jury trial on issues triable by a jury. The exact pages of this "actual malice" shown in the record of this case will be presented in the briefs to the Supreme Court of the United States. Not only did Ms. King knowingly make a false statement by quoting Dr. Dunning's false statement but Ms. King and the Miami News et al. are totally responsible for the alleged quoted statement purported to be by Dr. Dunning in the article "The Mouse Doctor Who Roared" Oct. 23, 1973 since Dr. Dunning denies ever talking to a Miami News employee about Dr. Asam (p. 26 when Dr. Dunning stated in her deposition, Dec. 21, 1977,

"I do not recall ever saying anything to The Miami News about Dr. Asam."

"Therefore, it is possible that Terry Johnson King fabricated the statements attributed to Dr. Dunning.

Page 4 Notice of Appeal to the Supreme Court of the United States

"Terry Johnson King, The Miami News reporter, claimed the quote attributed to Dr. Dunning was made by Dr. Dunning.

"Quote from record of deposition Nov. 4, 1977 of Terry Johnson King (Mr. Donnellan) "Mrs. King, I refer" (from p. 40)(continued on p. 41), "you to the third paragraph in

Exhibit I (continued)
"in the last column of the article, and specifically to the statement enclosed in quotation marks reading,

> "She is very emotionally disturbed, and has no qualifications to do cancer research. She may have gotten her doctorate from the George Washington University, but I suspect they gave her the degree to get rid of her."

"Donnellan continued on p. 41.

> "Is that a word-for-word statement made to you by Dr. Dunning?"

"King answered: "It is." (Emphasis added.)
"According to these two statements quoted above from the record, the possibility exists, that Ms. King fabricated the quote attributed to Dr. Dunning; therefore, the "Summary Final Judgment" should be reversed.
"The Bottom line of this incorrect public figure decision by the Third District Court of Appeal is that the Third District has been misled by Mr. Averill's "figment of his imagination" (Mr. Averill is the Miami News attorney) that Dr. Lampkin-Asam is a public figure by stating in his brief for Appellees that Dr. Lampkin-Asam, is a public figure with no reference to the record on p. 10 of his Appellee Brief,

> "She has attempted to arouse public indignation and to influence the allocation of public funds."

This is a false statement with no reference to the record; Dr. Lampkin-Asam has not influenced any allocation of public funds, and has not aroused any public indignation.
Further, Mr. Averill stated,

> "She is a scientist taking part in a public debate on a public health matter."

"This is a false statement with no reference to the record. The truth is that Dr. Lampkin-Asam has never been in a public debate. The instant case should be decided according to

Exhibit I (continued)
"facts in the record, not according to what an attorney, Mr. Averill, states in an Appellee Brief without reference to the record. This is evidence of an attorney, Mr. Averill for the Miami News et al., perpetrating a fraud on the appellate court. (See pp. 7-8 Supreme Court of Florida Jurisdictional Brief by Lampkin-Asam).

"The substantative federal question is:

Page 5 Notice of Appeal to the Supreme Court of the United States

"Whether the highest court of the state can decide a case on a discretionary basis if federal question is raised in which the state law is impugning on the federal law and caused Dr. Lampkin-Asam's rights under the First, Sixth and Fourteenth Amendments to the U.S. Constitution to be infringed?

"For the above reasons, the Appellant, Julia McCain Lampkin-Asam, Ph.D., respectfully requests The Supreme Court of the United States take jurisdiction in this instant case and decide whether Dr. Lampkin-Asam is a public figure and whether "actual malice" should be decided by a jury.

"Respectfully submitted,
s/ Julia McCain Lampkin Asam
Julia McCain Lampkin-Asam, Ph.D.
Appellant Pro Se
2243 Gorham Ave.
Ft. Myers, Florida 33907

"CERTIFICATE OF SERVICE

"I HEREBY CERTIFY that a true copy of the foregoing was sent by certified mail to Hon. Daniel Robert Graham, Governor of the State of Florida, The Capitol, Tallahassee, Florida; Hon. Jim Smith, Attorney General, State of Florida, The Capitol, Tallahassee, Florida; Mr. Sid J. White, Clerk Supreme

Exhibit I (continued)
"Court of Florida, Supreme Court Building, Tallahassee, Florida 32301; Mr. Louis J. Spallone, Clerk District Court of Appeal, Third District, 2001 S.W. 117 Ave., Miami, Florida 33165; Mr. Richard P. Brinker, Clerk, Circuit Court, Eleventh Judicial Circuit in and for Dade County, Dade County Courthouse, 73 West Flagler St., Miami, Florida 33130; and Mr. Joseph P. Averill, Attorney, representing the Miami News et al. 1237 City National Bank Building, 25 West Flagler St., Miami, Florida 33130 this 24th day of June 1982.

By:s/ Julia McCain Lampkin Asam
Julia McCain Lampkin Asam, Ph.D.
Pro Se

"PROOF OF SERVICE ON SEPARATE PAGE"

Exhibit J
Amended Complaint R. 23,quote Count I.

"COUNT I

"9. The Plaintiff, by reference, adopts and reiterates all the relevant allegations hereinabove set forth and further avers that:

"10. On October 23, 1973, an article appeared on the front page of Section C of THE MIAMI NEWS under the name and authorship of Defendant KING. Said article was entitled "The Mouse Doctor who Roared", the topic of which article was the Plaintiff herein. A copy of said article is attached hereto (Exhibit A) and incorporated herein.

"11. Said article states, inter alia, that "she is very emotionally disturbed, and has no qualifications to do cancer research. She may have gotten her Doctorate from George Washington University, but I suspect that they gave her the degree to get rid of her", said expression being attributed to Defendant DUNNING.

"12. By the making of the statement as set out above, the Defendants libeled and/or slandered the Plaintiff herein in her reputation and held her up to ridicule, causing the Plaintiff to suffer humiliation, embarrassment, and hindered and damaged her right and ability to pursue her profession.

"13. Said statement imputed to the Plaintiff a want of capacity or fitness for engaging in her profession, business or employment, thereby injuriously affecting the Plaintiff.

"14. Said statement was made and published to needlessly injure the Plaintiff.

"15. Said statement and publication was made in bad faith and without reasonable grounds for belief thereof by the makers.

Exhibit J (continued)

"16. The tortious conduct as alleged hereinabove was willful, malicious and with complete disregard for the rights of the Plaintiff and were made with both actual and constructive knowledge of the falsity or untruth of said statement and publication.

"17. The Plaintiff complied with the provisions in Florida Statutes 770.01 in all respects; specifically, demand was made in writing upon the Defendant THE MIAMI NEWS to retract or otherwise mitigate the statements and matters complained of herein and their damaging effects, but notwithstanding said demand, the Defendant, THE MIAMI NEWS, utterly failed and refused to so do, causing the Plaintiff to suffer further damage and injury to herself and her reputation. A copy of said writing is attached hereto (Exhibit B) and incorporated herein.

"18. In addition to the embarrassment and humiliation suffered by the Plaintiff as a result of the acts complained of herein, said acts, which constituted interference with professional business relationships of the Plaintiff, caused her the loss of gainful employment in the field of cancer research, which loss was proximately caused by said tortious conduct and interference.

"19. The Plaintiff, as a result of the acts complained of herein, was also hindered and prevented from gaining employment as a professor, teacher or instructor in public or private education.

"20. The Plaintiff was additionally hindered and prevented from obtaining any type or amount of public or private grant to fund or assist in the funding of her work and research.

Exhibit J (continued)

"21. The loss of funds and research facilities as enumerated above hindered and prevented further development of the Plaintiff's patent and the product(s) to flow therefrom.

"WHEREFORE, the Plaintiff demands judgment for compensatory and punitive damages in an amount in excess of the minimum jurisdictional requirements of this Court, plus costs, and demands a trial by jury of all issues triable as of right by a jury."

Exhibit K

CONSTITUTUTIONAL PROVISIONS AND STATUTES INVOLVED - QUOTES

United States Constitution, Amendment I,

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment V in pertinent part, as follows:

"No person shall...be deprived of life, liberty or property, without due process of law;..."

United States Constitution, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Exhibit K (continued)

United States Constitution, Amendment XIV
"Section 1, All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside; No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor the equal protection of the laws."

Quotes from Constitutional Law, 4 ed., P.A. Freund, A.E. Sutherland, M.D. Howe and E.J. Brown, Little, Brown & Co., Boston, 1977.

Florida Statutes.

After April 1, 1980, Article 5, section 3(b)3 of the Florida Constitution, reads,

"May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."
Quotes from the U.S.C. concerning the jurisdiction of the Supreme Court of the United States on the next p. a-35.

Exhibit K (continued)

28 USC Section 1257 (2)

"By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

28 USC Section 2106

"The Supreme Court of any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

42 USC section 1983

"Every person who, under color of any statute, ordinance, regulation, custom, usuage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities accured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 USC section 1343 (3)

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usuage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

Office - Supreme Court, U.S.
FILED
AUG 31 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-193

In the Supreme Court of the United States

October Term, 1981

JULJA McCAIN LAMPKIN-ASAM,
Appellant,

vs.

MIAMI DAILY NEWS, INC. and TIMOTHY JOHNSON, as Personal Representative of the late Terry Johnson King,
Appellees.

On Appeal From District Court of Appeal, Third District of Florida

MOTION OF APPELLEES, MIAMI DAILY NEWS, INC. AND TIMOTHY JOHNSON, AS PERSONAL REPRESENTATIVE OF THE LATE TERRY JOHNSON KING, TO DISMISS OR AFFIRM

Joseph P. Averill, Esq.
(Counsel of Record)
Suite 1237
City National Bank Building
25 West Flagler Street
Miami, Florida 33130
Counsel for Appellees, Miami Daily News, Inc. and Timothy Johnson, as Personal Representative of the late Terry Johnson King

August 30, 1982

R. L. Mitchell, Inc., 906 Cherry Street, Kansas City, Mo. 64106, (816) 421-5020

QUESTIONS PRESENTED

1. Whether[1] Florida's appellate procedures, establishing review as a matter of right by an intermediate court but limiting further appellate review to the discretion of the Florida Supreme Court, is violative of the First the Fifth, the Sixth, or the Fourteenth Amendment to the United States Constitution?

2. Whether[2] the original jurisdiction of the Supreme Court of the United States can be invoked pursuant to 28 U.S.C. §2106 or 42 U.S.C. §1983?

3. Whether[3] either the First Amendment or the Sixth Amendment to the Constitution of the United States of America requires a trial by jury in a state court of a civil action at law?

---

1. This question is a restatement of questions I, II, and VII of the "Questions Presented" of Appellant.

2. This question is a restatement of questions III, IV, and V of "Questions Presented" of Appellant.

3. This question is a restatement of question VI of the "Questions Presented" of Appellant.

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No. 82-193

In the Supreme Court of the United States

October Term, 1981

JULIA McCAIN LAMPKIN-ASAM,
Appellant,

VS.

MIAMI DAILY NEWS, INC. and TIMOTHY JOHNSON, as Personal Representative of the late Terry Johnson King,
Appellees.

ON APPEAL FROM DISTRICT COURT OF APPEAL,
THIRD DISTRICT OF FLORIDA

MOTION OF APPELLEES, MIAMI DAILY NEWS, INC. AND TIMOTHY JOHNSON, AS PERSONAL REPRESENTATIVE OF THE LATE TERRY JOHNSON KING, TO DISMISS OR AFFIRM

Pursuant to Rule 16, *Rules of the Supreme Court*, the Appellees, Miami Daily News, Inc. and Timothy Johnson, as personal representative of the late Terry Johnson King, make application to the Court for an order either affirming the opinion and judgment of the District Court of Appeal, Third District of Florida, or, in the alternative, dismissing this Appeal.

The bases for this application are stated more particularly as follows:

1. Pursuant to Rule 16(a), *Rules of the Supreme Court*, an order of dismissal is sought in that this appeal is not within the jurisdiction of this Court and is not taken in conformity with 28 U.S.C. §1257. The decision of the District Court of Appeal, Third District of Florida, is not against the validity of any treaty or statute of the United States and is not in favor of the validity of any statute challenged on the ground of such statute being repugnant to the Constitution, treaties or laws of the United States.

2. Pursuant to Rule 16(b), *Rules of the Supreme Court*, an order of dismissal is sought in that any federal question sought to be reviewed here was not timely or properly raised and expressly passed on by the Florida courts.

3. Pursuant to Rule 16(b), *Rules of the Supreme Court*, an order of dismissal is sought in that this proceeding does not present a substantial federal question.

4. Pursuant to Rule 16(c), *Rules of the Supreme Court*, an order of affirmance is sought, in the alternative, in that it is manifest that the questions upon which the decision of this cause depends are so unsubstantial as to not need further argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, *Constitution of the United States*

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, *Constitution of the United States*

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, *Constitution of the United States*

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Fourteenth Amendment, *Constitution of the United States*

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive the person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 28

§1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States.

For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals.

United States Code, Title 28

§2106. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such ap-

propriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

United States Code, Title 42

§1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Florida Constitution, Section 3

(b) JURISDICTION. The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state

officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

(8) May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

Florida Constitution, Section 4

(b) JURISDICTION.—

(1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

(2) District courts of appeal shall have the power of direct review of administrative action, as prescribed by general law.

(3) A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court. A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction. To the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.

STATEMENT

The Appellant filed, in a Florida trial court,[4] a civil action at law, sounding in libel. (App. A3) Ultimately, the trial court entered summary judgment against the Appellant. (App. A3) Under Florida law, the Appellant had an absolute right to appellate review by an intermediate appellate court. She exercised that right. She complained to the intermediate appellate court[5] that the trial court had misapplied the law. She said the trial court was wrong. At no time did she suggest that the trial court had not accorded due deference to her constitutional rights. The intermediate appellate court disagreed.[6] The trial court was affirmed. (App. A1-A8, A9)

The Appellant then sought a second appellate review—this time by the Florida Supreme Court. (App. A10) She attempted to convince the Florida Supreme Court that the decision of the intermediate appellate court conflicted with other reported appellate decisions. (App. A12-A25) At no point did she suggest to the Florida Supreme Court that the trial court or the intermediate appellate court had failed to respect her constitutional rights. (App. A12-A25)

Under Florida law, review of an appellate decision is a matter within the discretion of the Florida Supreme Court. Appellant did not get a second appeal. The Florida Supreme Court exercised its discretion by refusing

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4. The Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida.

to review the intermediate appellate court's decision. At

5. District Court of Appeal of Florida, Third District.

6. The decision of the intermediate appellate court has been reported. Lampkin-Asam v. Miami Daily News, Inc., 408 So.2d 666 (Fla. 3d DCA 1982).

no time did the Appellant suggest to the Florida Supreme Court that the limited and discretionary review by a second appellate court impaired her exercise of rights granted to her under the United States Constitution.

Neither the decision of the intermediate appellate court (App. A1-A8, A9) nor the order of the Florida Supreme Court (App. A36) invalidates any treaty or statute of the United States. Neither passes on the validity of any statute challenged on the ground that the statute is repugnant to the Constitution, treaties or laws of the United States. No such issues were raised in the Florida courts.

ARGUMENT

Appellant's Invocation of "Original Jurisdiction"

In the Florida courts, there were three parties to this matter. One was Appellant, who was the plaintiff in the trial court. The remaining parties were the two defendants, Miami Daily News, Inc. and Timothy Johnson, as personal representative of the late Terry Johnson King.

In the Supreme Court of the United States, however, Appellant has broadened her litigation. In addition to the adverse parties in the Florida courts, she has added as parties the Florida courts themselves. The Appellant purports to accomplish this through a baseless invocation of this Court's "original jurisdiction."[7]

The original jurisdiction of the Supreme Court of the United States is constitutionally created. Article III, Section 2, *Constitution of the United States*. It is defined by statute. 28 U.S.C. §1251. Appellant has simply ignored these constitutional and statutory provisions. Without

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7. This argument responds to questions III, IV, and V of Appellant's "Questions Presented."

benefit of leave of this Court and without so much as a complaint or initial process, she has attempted to establish, under 42 U.S.C. §1983, a civil rights action against the intermediate appellate court which ruled against her.[8] She does this even though 28 U.S.C. §1343 grants to the federal district courts original jurisdiction over civil rights actions. Appellant also relies upon 28 U.S.C. §2106. The jurisdiction of the Supreme Court of the United States is in no way impacted by 28 U.S.C. §2106, which merely is a congressional grant of broad remedial power. This statute is in no way a grant of jurisdiction, despite Appellant's reliance on it. Appellant's attempt to invoke this Court's "original jurisdiction" is baseless, especially when viewed in light of the asserted authority for such invocation.

Due Process in Florida's Courts

While differing in nuance and detail, Florida's court system is not unlike the Federal system.[9] It is a three-tier system. The trial courts, known as the "Circuit Courts," are courts of general jurisdiction, hearing equity matters and, where the amount in controversy exceeds $5,000, matters at law. Article V, Section 3, *Florida Constitution; Florida Statutes* 26.012 (1981). Under Florida law, a party aggrieved by a final judgment has an absolute right to appellate review by an intermediate appellate court, known as "District Courts." Article V, Section 4(b), *Florida Constitution*. Immediate review of interlocutory orders is limited, but any interlocutory order entered prior to final

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8. Even were jurisdiction properly vested, this "civil rights" action against Florida courts would encounter substantial obstacles. Stump v. Sparkman, 435 U.S. 349 (1978).

9. This argument responds to questions I, II, and VII of Appellant's "Questions Presented."

judgment may be reviewed by the intermediate appellate court reviewing the final judgment.

By state constitution, Florida's Supreme Court is less accessible. Its jurisdiction is limited and in some areas, even where it could exercise jurisdiction, Florida's Supreme Court has the right to decline to do so. Article V, Section 3(b), *Florida Constitution*. Thus, after an initial determination is made by a Circuit Court, a litigant in Florida has an absolute right to one appellate review and a chance of a second appellate review in the Florida Supreme Court.

It is the structure of this judicial system which Appellant claims is constitutionally defective. She is clearly wrong.[10] Notwithstanding Appellant's claim to the contrary, there is simply nothing in the First Amendment or the Sixth Amendment to the United States Constitution which precludes Florida from affording its litigants a system which parallels the Federal court system. Florida litigants have an absolute right to one appellate review and a chance at a second appellate review. The "due process" requirements of the Fifth and Fourteenth Amendments to the Constitution do not require that Florida accord its litigants any appellate review at all. *National Union of Maritime Cooks and Stewards v. Arnold*, 348 U.S. 37 (1954); *District of Columbia v. Clowans*, 300 U.S. 617 (1937); *McKane v. Durston*, 153 U.S. 684 (1894). "Due process" requires only that there be due process in the tribunal of first instance, here Florida's trial court. *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74 (1930). Appellant never claimed in the Florida

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10. Perhaps it is for this reason that Appellant has not filed with this Court any certificate from a Florida court that a substantial federal question was raised and decided. Nor has Appellant sought from the Florida Court such a certificate. Herb v. Pitcairn, 324 U.S. 117 (1944); Whitney v. California, 274 U.S. 357 (1927).

courts that she was not afforded due process in the trial court, only that the trial court was wrong. Her "due process" argument arises merely from the fact that the Florida Supreme Court, in the exercise of its discretion, declined to grant her a second appeal. The argument is clearly frivolous.

The Lack of a Substantial Federal Question

This appeal presents only insubstantial Federal questions. Moreover, none of these questions, to the extent they be Federal questions, were raised and decided in the Florida courts.[11]

Appellant contends there is something in the Constitution of the United States which requires that the Florida courts afford her a jury trial in a civil action at law.[12] In advancing this specious argument, Appellant relies upon the First and Sixth Amendments to the United States Constitution. The First Amendment guarantees Appellant the right to speak freely, but it does not guarantee her the right to speak to a jury in a Florida court. The Sixth Amendment reflects the Founding Fathers' concern that governmental power would override the rights of a criminal defendant. Appellant was not in the Florida court a criminal defendant; she was a plaintiff in a civil action at law.[13] The Sixth Amendment in no way im-

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11. Pursuant to 28 U.S.C. §2103, the Supreme Court of the United States may treat an improvident appeal as a Petition for Writ of Certiorari. However, the lack of a substantial federal question here precludes such treatment.

12. This argument responds to question VI of Appellant's "Questions Presented."

13. More germane perhaps would be the Seventh Amendment to the Constitution of the United States. However, the Seventh Amendment operates, by its terms, only on courts of the United States. This Amendment has not been incorporated into the Fourteenth Amendment and therefore is not operative upon the several states. Minneapolis & St. Louis Railroad Co. v. Bombolis, 241 U.S. 211 (1916).

pacts Appellant's rights in this case. Nor does the "due process" of the Fourteenth Amendment guarantee her a jury trial in state court.[14] *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 384 U.S. 151 (1931); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226 (1923).

Equally insubstantial is the Appellant's claim of a federal question arising from the structure of Florida's court system. She complains that she was only allowed one appellate review. One appellate review is more appellate review than due process requires. *National Union of Maritime Cooks and Stewards v. Arnold, supra.* Due process only requires that there be due process in the court of first instance. *Ohio ex rel. Bryant v. Akron Metropolitan Park District, supra.* Nowhere has Appellant claimed this was not the case. There is simply no substantial federal question for this Court to review.

As in the Florida courts, Appellant here contends that the trial court was wrong. Assuming *arguendo* this to be the case, mere judicial error in a state court does not raise an issue of constitutional proportions. *Buchalter v. New York*, 319 U.S. 427 (1943); *Worcester County Trust Co. v.*

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14. Appellant does not contend that an inappropriate standard was utilized in entering summary judgment. In fact, Florida's intermediate appellate court evaluated the propriety of summary judgment against traditional standards. *Compare* Hutchinson v. Proxmire, 443 U.S. 111, 120, n.9 (1979) with Lampkin-Asam v. Miami Daily News, Inc., 408 So.2d 666, 668, n.3 (Fla. 3d DCA 1982). In any event, the appropriate standard under state law for entering summary judgment is purely a matter of state law, unless the standard contravenes the Constitution of the United States. No such claim is made here. None certainly was made as this matter made its way through the Florida courts. Even in Federal courts, governed as they are by the Seventh Amendment, summary judgment procedures are not violative of the right to trial by jury. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Galloway v. United States, 319 U.S. 372 (1943); Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902).

Riley, 302 U.S. 292 (1937). Nowhere in the Florida courts did Appellant complain of "due process" violations as a result of grossly arbitrary actions which produced an inherently unfair result. There is here simply no Federal question, much less a substantial Federal question.

CONCLUSION

For the reasons advanced, the Appellees, Miami Daily News, Inc. and Timothy Johnson, as Personal Representative of the late Terry Johnson King, respectfully submit that this Appeal was improvidently initiated and that the federal questions advanced by Appellant are so insubstantial as to not need further argument. The Appellees, therefore, respectfully make application to the Court for an Order dismissing this Appeal or, in the alternative, for an Order affirming the prior Judgment.

Respectfully submitted,

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(305) 377-3577

Counsel for Appellees, Miami Daily News, Inc. and Timothy Johnson, as Personal Representative of the late Terry Johnson King

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Motion of Appellees, Miami Daily News, Inc. and Timothy Johnson, as Personal Representative of the late Terry Johnson King, to Dismiss or Affirm, were sent, via the U.S. Postal Service, this date to:

Julia McCain Lampkin-Asam
2243 Gorham Avenue
Ft. Myers, Florida 33907

I ALSO CERTIFY, in conformity with the Certificate of Service of Appellant's Jurisdictional Statement, that three true copies of the foregoing Motion of Appellees, Miami Daily News, Inc. and Timothy Johnson, as Personal Representative of the late Terry Johnson King, to Dismiss or Affirm, were sent, via the U.S. Postal Service this date, to the following:

The Honorable Robert Graham
Governor of the State of Florida
The Capitol
Tallahassee, Florida;

The Honorable Jim Smith
Attorney General
State of Florida
The Capitol
Tallahassee, Florida;

The Honorable Sid J. White
Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 33201;

The Honorable Louis J. Spallone
Clerk
District Court of Appeal,
Third District
2001 South West 117 Ave.
Miami, Florida 33165; and

The Honorable Richard P. Brinker
Clerk
Circuit Court, Eleventh Judicial
Circuit, in and for Dade County
Dade County Courthouse
73 West Flagler Street
Miami, Florida 33130.

DATED this 30th day of August, 1982.

JOSEPH P. AVERILL, ESQ.
Counsel for Appellees, Miami Daily News, Inc. and Timothy Johnson, as Personal Representative of the late Terry Johnson King

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1981

CASE NO. 80-2053

JULIA McCAIN LAMPKIN-ASAM,
Appellant,

vs.

MIAMI DAILY NEWS, INC., a Florida corporation, d/b/a The Miami News, and TIMOTHY JOHNSON, as personal representative of the late TERRY JOHNSON KING,
Appellees.

Opinion filed December 29, 1981.

An Appeal from the Circuit Court for Dade County, Dan Satin, Judge.

Joel V. Lumer, for appellant.
Joseph P. Averill, for appellees.

Before BARKDULL, BASKIN and PEARSON, DANIEL, JJ.

PEARSON, DANIEL, Judge.

Julia McCain Lampkin-Asam, the plaintiff below, wrote a book describing the events which, in Asam's view, had precluded her from receiving research grants for almost a decade and developing a cure for cancer. A major theme of the book, entitled "Malignant Intrigue," was that

Asam's professional competence as a cancer scientist had been disparaged and her mental stability questioned by people in the "cancer establishment." Asam's book identified one Dr. Wilhelmina Dunning, her former supervisor, as the primary villain whose statements concerning Asam had contagiously spread through the cancer research community so as to create, as the plaintiff's title aptly put it, a malignant intrigue.

In 1973, Asam, wanting to draw public attention to her research and need for research funds, brought her 753-page book to the attention of The Miami News. The late Mrs. Terry Johnson King, then Lifestyle Editor of the News, interviewed Asam and decided to write a column about "Malignant Intrigue" and its author. King read the book and concluded that it was a rather vitriolic attack on Dr. Dunning. King decided to get Dunning's side of the story before writing her column and interviewed Dunning on the phone. King then wrote the column, which, overall, was an unflattering evaluation of the plaintiff's malignant intrigue theory. The column included a quote about Asam attributed to Dunning:[1]

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1. The column also characterized the charges made by Asam in her book as "almost paranoical." Since we find King's characterization to be an expression of opinion based on facts set forth in the column, it is, in our view, entitled to absolute constitutional protection. From v. Tallahassee Democrat, Inc., 400 So.2d 52 (Fla. 1st DCA 1981). In Gertz v. Robert Welch, Inc., 418 U.S. 323, 229-340, 94 S.Ct. 2997, 41 L.Ed.2d 289 (1974), the Supreme Court said:

> "[U]nder the First Amendment, there is no such thing as a false idea. However pernicious an opinion might seem, we depend upon its correction not on the conscience of judges or juries but on the competition of other ideas."

See also Palm Beach Newspapers, Inc. v. Early, 334 So.2d 50 (Fla. 4th DCA 1976); Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied sub nom.* Hotchner v. Doubleday & Company, Inc., 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95 (1977); Loeb v. Globe Newspaper Co., 489 F.Supp. 481 (D.Mass. 1980). Therefore, we devote the remainder of this opinion to the Dunning statement.

> "To which the highly respected Dr. Dunning says, 'She [Asam] is very emotionally disturbed, and has no qualifications to do cancer research. She may have gotten her doctorate from George Washington University, but I suspect they gave her the degree to get rid of her.' "

Asam then sued Dunning,[2] The Miami News, and Mrs. King alleging defamation. From a summary judgment entered in favor of The Miami News and the estate of Mrs. King, Asam appeals.

We affirm the summary judgment. The determination that a person is a public figure is properly for the court. *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966); *Gadsden County Times, Incorporated v. Horne*, 382 So.2d 347 (Fla. 1st DCA 1980); *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (5th Cir. 1968); *Logan v. District of Columbia*, 447 F.Supp. 1328 (D.D.C. 1978); *Hoffman v. Washington Post Co.*, 433 F.Supp. 600 (D.D.C. 1977), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978). Asam's efforts to arouse public indignation and influence the allocation of public funds, *Gibson v. Maloney*, 231 So.2d 823 (Fla. 1970), *second appeal*, 263 So.2d 632 (Fla. 1st DCA 1972); *Murphy v. Daytona Beach Humane Society, Inc.*, 176 So.2d 922 (Fla. 1st DCA 1965); participation in public debates on public health matters, *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2d Cir.), *cert. denied*, U.S. , 101 S.Ct. 117, L.Ed.2d (1980); *Exner v. American Medical Association*, 12 Wash.App. 215, 529 P.2d 863 (1974); publication and distribution of the autobiographical "Malignant Intrigue" and

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2. Dunning was earlier favored with a summary judgment. Asam's appeal from that judgment was dismissed by this court as untimely filed. Asam unsuccessfully sought relief in the Florida Supreme Court from this dismissal. Lampkin-Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978).

other writings, lectures and speeches, and efforts to seek substantial publicity, including the very publicity which is the subject matter of this action, *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied sub nom. Hotchner v. Doubleday & Company, Inc.*, 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95 (1977); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976); *Guitar v. Westinghouse Electric Corporation*, 396 F.Supp. 1042 (S.D.N.Y. 1975), among other things, aggregately show her, as a matter of law, to be a public figure. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 99 S.Ct. 2071, 61 L.Ed.2d 450 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979).

Asam's status as a public figure requires her to establish that the newspaper and Mrs. King acted with actual malice in the constitutional sense, *Curtis Publishing Company v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), that is, the publication involved was deliberately falsified or published recklessly despite the publisher's awareness of probable falsity, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 696 (1964); *Gibson v. Maloney, supra.* Viewing the evidence most favorable to the plaintiff, to determine whether there exists a genuine issue of material fact upon which a reasonable jury could find *with convincing clarity* that the defendants acted with such actual malice,[3] we find absolutely no clear

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3. This is the well-accepted test for evaluating the propriety of a summary judgment in a defamation case where actual malice in the constitutional sense must be shown. *See* Yiamouyiannis v. Consumers Union of the United States, Inc., *supra*; Long v. Arcell, 618 F.2d 1145 (5th Cir. 1980); Hahn v. Sargent, 523 F.2d 461 (1st Cir.), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976); Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed.2d 111 (1974); Nader v. deToledano, 408 A.2d 31 (D.C.App. 1979), *cert. denied*, 444 U.S. 1078,

(Continued on following page)

and convincing evidence that the defendants knew that the information published was incorrect or that the defendants had any degree, much less a high degree, of awareness of the probable falsity of this information. *See Long v. Arcell*, 618 F.2d 1145 (5th Cir. 1980).

Mrs. King's testimony in her deposition is, unequivocally, that she accurately quoted Dr. Dunning. On the other hand, Dunning's testimony is that she was "not sure" if she made the statements. Dunning doubted that she would remember the contents of a conversation which took place years before. While she did not recall the conversation with Mrs. King, she admitted some recollection of the book being reviewed, and because ". . . I had been maligned in the book, she might have contacted me to find out if the statements were true." Dunning believed she was "misquoted," because she would not have said those things "in that form." She admitted that responses could possibly have been drawn from her in a succession of questions which could account for the eventual form of the statement attributed to her. Apart from whether she revealed it to Mrs. King during the telephone

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Footnote continued—

S.Ct. , L.Ed.2d (1980); National Association of Government Employees, Inc. v. Central Broadcasting Corp., 396 N.E.2d 996 (1979), *cert. denied*, 440 U.S. 935, S.Ct. , L.Ed.2d (1980); In re McDonough, 296 N.W.2d 648 (Minn. 1980); Brophy v. Philadelphia Newspapers, Inc., Pa.Super, Ct. , 422 A.2d 625 (1980). The standard (convincing clarity, not preponderance) against which the evidence is examined is dictated by New York Times v. Sullivan, *supra;* but the manner of examining the evidence (viewing it most favorably for the non-moving party) in light of the standard is the same as in all summary judgment cases. *See* Guam Federation of Teachers, Local 1581 v. Ysrael, *supra*. *Compare* Wasserman v. Time, Inc., 424 F.2d 920, 922-23 (D.C. Cir.) (Wright, J., concurring), *cert. denied*, 398 U.S. 940, 90 S.Ct. 1844, 26 L.Ed.2d 273 (1970). *See generally* Comment, The Propriety of Granting Summary Judgment for Defendants in Defamation Suits Involving Actual Malice, 26 Vill. L.Rev. 470 (1981).

interview, it was, in fact, Dunning's opinion that George Washington University might have given Asam her degree to get rid of her. Dunning admitted she could have said that the plaintiff was "not qualified to do *independent* cancer research." But most significantly, Dunning said that *if* she made the remarks attributed to her by Mrs. King, she made them facetiously and did not "grant permission to anybody to publish such a facetious remark."

In *Long v. Arcell, supra,* the Fifth Circuit affirmed a judgment notwithstanding a jury verdict of compensatory and punitive damages in favor of a defamation plaintiff. The litigation was prompted by the newspaper article which stated that an ambulance service may have violated the law by operating without a license from the State Board of Health. The reporter testified that he was told by two Board of Health employees that the ambulance service had not been licensed. At trial, one Board of Health employee directly contradicted the reporter's testimony, saying that he told the reporter that the ambulance service was licensed to operate. Moreover, the ambulance service's lawyer asserted that, on the day before publication, he read the reporter a letter from the other Board of Health employee which stated that the ambulance service was authorized to operate. The Fifth Circuit held, 618 F.2d at 1148-49:

> "The plaintiffs' case rested almost entirely upon the testimony of Bradshaw [a Board of Health employee] and Wilson [the attorney for the ambulance service]. Theirs was the only testimony relating directly to the defendant's state of mind. There was no documentary evidence which showed that the defendants knew their article was false or entertained serious

doubts about its accuracy.[4] In sum, the jury was left to decide the case based on the conflicting accounts of the conversations described above. If the applicable burden of proof had been a preponderance of the evidence, a jury verdict either way would have to stand. Similarly, if liability could be imposed on a clear and convincing showing of negligence, we would be hard pressed to disregard the jury's verdict. We repeat, however, that the plaintiff's burden was to prove actual malice by clear and convincing evidence that the defendants knew that their information was incorrect or had a 'high degree of awareness of . . . [its] probable falsity.' (citation omitted).

"Although the Constitution neither condones nor encourages careless journalistic practices, the journalist who merely is careless may not be held liable for defaming a public figure. That is because the interests we must consider in libel cases are not only those of the defamed and the defamer. If they were, the former would prevail with a greater degree of frequency. In all libel suits between a public figure and a publisher the public intervenes as a matter of right, and its interest must be considered. Only by limiting liability to those situations in which the publisher has acted with actual malice do we fully protect the public's right to the benefits of a free and uncensored press."

Where, as in the present case, the person to whom the quoted words are attributed has not unequivocally de-

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4. A plaintiff claiming defamation now has access into the editorial process to procure evidence bearing on the element of actual malice. Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Such a plaintiff may even discover the identity of confidential sources. Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980).

nied making the statement attributed to her; has denied only the form, but not the substance, so as not to rule out the possibility that she was *mistakenly*, but immaterially, misquoted; and has indeed allowed that she may have actually made the statements "facetiously"; the requisite high standard of proof is simply not met.[5] *In re McDonough, supra* ("that high standard of proof usually would require more than one man's word against another, especially where, as here, mistake can not be ruled out.").

Our holding makes it unnecessary to consider the other contentions made by the appellees in support of the summary judgments, and we expressly do not rule upon them.

Affirmed.

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5. We note also that the theory of the plaintiff's action against Dr. Dunning was that Dunning told Mrs. King exactly what was printed and that Dunning had lied. When the plaintiff lost that action, she shifted gears and said that Dunning never said these things, and the newspaper fabricated the statement. Dunning's testimony is even more suspect considering that it was given when Dunning was a defendant facing a defamation action.

(Filed January 27, 1982)

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1982

WEDNESDAY, JANUARY 27, 1982

CASE NO. 80-2053

JULIA McCAIN LAMPKIN-ASAM, Ph.D.,
Appellant,

vs.

MIAMI DAILY NEWS, INC., etc.,
Appellees.

Appellant, in proper person having filed in this cause motion for rehearing and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

A True Copy

ATTEST:

Louis J. Spallone
Clerk District Court of
Appeal, Third District
By /s/ Evelyn A. Hellman
Deputy Clerk
cc: Julia McCain Lampkin Asam
Joseph P. Averill
/dp

IN THE DISTRICT COURT OF APPEAL
OF THE THIRD DISTRICT
OF FLORIDA

Case No. 80-2053

JULIA McCAIN LAMPKIN-ASAM, Ph.D.,
Plaintiff, Appellant, Petitioner,

vs.

MIAMI DAILY NEWS, INC. a Florida Corporation, d/b/a The Miami News, and TIMOTHY JOHNSON, as personal representative of the late TERRY JOHNSON KING,
Defendants, Appellees, Respondents.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Julia McCain Lampkin-Asam, Ph.D., Plaintiff, Appellant, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered December 29, 1981 (Seven-page opinion filed December 29, 1981); rehearing denied on January 27, 1982.

The decision (1) expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law, and (2) expressly construes a provision of the state or federal constitution.

Respectfully submitted,

/s/ Julia McCain Lampkin Asam
Julia McCain Lampkin-Asam, Ph.D.
Pro Se
Plaintiff, Appellant, Petitioner
2243 Gorham Ave.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice to Invoke Discretionary Jurisdiction was sent by mail this 18th day of February, 1982 to Mr. Joseph Averill, Attorney, 1237 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

By: /s/ Julia McCain Lampkin Asam
Julia McCain Lampkin-Asam, Ph.D.

IN THE SUPREME COURT OF FLORIDA

CASE NO.

JULIA McCAIN LAMPKIN-ASAM, Ph.D.,
Plaintiff, Appellant, Petitioner,

vs.

MIAMI DAILY NEWS, INC., a Florida Corporation d/b/a The Miami News, and TIMOTHY JOHNSON, as personal representative of the late TERRY JOHNSON KING,
Defendants, Appellees, Respondents.

JURISDICTION BRIEF FOR DISCRETIONARY REVIEW BY PETITIONER

For Discretionary Review of Case no. 80-2053 from District Court of Appeal, Third District of Florida
Dated February 25, 1982

Submitted by:

Julia McCain Lampkin-Asam, Ph.D.
Pro Se, Petitioner
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STATEMENT OF THE CASE

A Complaint was filed on Oct. 16, 1975 (Record (R) 1-4). The Plaintiff below, Appellant, and Petitioner is Julia McCain Lampkin-Asam, Ph.D. The Defendants below, Appellees, and Respondents are the Miami Daily News, Inc., a Florida Corporation d/b/a/ The Miami News and, Timothy Johnson, as personal representative of the late Terry Johnson King. Upon motions to dismiss (R. 9-10, 13-14) and stipulation of the parties (R. 24), one of the defendants was "removed as a party to this action" (R. 23). An Amended Complaint was filed naming as Defendants Wilhelmina Francis Dunning, Terry Johnson King and Miami Daily News, Inc. (R. 22-30). The motions to dismiss filed by these defendants (R. 31-32, 34-35) were denied (R. 36). Defendant Dunning answered (R. 37-38). Defendants King and Miami Daily News filed a joint answer in which Miami Daily News filed a counterclaim (R. 40-44). Count III of the Amended Complaint was voluntarily dismissed (R. 594) as was the counterclaim (R. 1051). Summary judgment motions were filed by each of the defendants (R. 1108-1109, 1223-1225) and the plaintiff (R. 1448-1449). Summary judgment was entered for defendant Dunning (R. 1471-1472). The motions of defendants, King and Miami Daily News (R. 1473) and plaintiff (R. 1470) were denied. The motion for reconsideration of defendants Miami Daily News and King (R. 1475-1476) was denied (R. 1483). Defendant King died and her personal representative was substituted as a defendant (R. 1484).

At the pretrial conference an issue arose as to the plaintiff's status as a public figure (R. 1901), and the court entered an order determining that the plaintiff was a public figure for purposes of applying the law of defamation (R. 1901-1904). The court then ordered a hearing on the issue of "actual malice" (R. 1811) and the parties

filed memoranda on this issue (R. 1797-1810, 1877-1894, 1895-1897). A hearing was held on Sept. 19, 1980 (R. 2001-2047) and on Oct. 8, 1980 (R. 2053-2057) the court entered a Summary Final Judgment for defendants Miami Daily News, *et al.* (R. 2053-2057). A motion for rehearing (R. 1907-1908) was denied (R. 1909) and the plaintiff filed a notice of appeal (R. 1910-1911), (Appendix pp. A-14-15). The Third District Court of Appeal on Dec. 29, 1981, filed a seven page opinion, affirmed (see Appendix bound separately, pp. A-1-A-7). On Jan. 5, 1982, the Appellant, Plaintiff below, filed a Motion and Petition for Rehearing (Appendix pp. A-18-A-75), which was denied on Jan. 27, 1982 (Appendix p. A-8). On Feb. 18, 1982 (Appendix p. A-17) petitioner, Appellant and Plaintiff below requested this Honorable Court invoke its Discretionary Jurisdiction to review this cause based upon two grounds: (1) that the decision expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law, and (2) that the decision expressly construes a provision of the state or federal constitution.

ISSUES

I. Does the Supreme Court of Florida have jurisdiction under Art. V, Section 3(b)3, *Fla. Constitution*, (*Fla. Rules of Appellate Procedure*, Rule 9.030(a)(2)(A)(iv), to review by discretionary review this cause in that there is an express direct conflict on the issue of Summary Judgment when genuine issues of material fact exists in the decision of the Third District Court of Appeal in *Lampkin-Asam v. Miami News et al.* case no. 80-2053 decided Dec. 29, 1981 (motion for rehearing denied Jan. 27, 1982) and in the decision of the First Dist., *Axelrod v. Califano*, 357 So 2d 1048, 1051, (Fla. 1st DCA 1978); in the decision of the Second Dist., *Holter v. WLCY, T.V., Inc.*, 366 So 2d

445, (Fla. 2nd DCA 1978); in previous decisions of Third Dist., *First Mortgage Investors v. Boulevard Nat. Bank of Miami*, 327 So 2d 830, 832 (Fla. 3d DCA 1976), and *Mejiah v. Rodriguez*, 342 So 2d 1066, (Fla. 3d DCA 1977); and the U.S. Supreme Court, *Hutchinson v. Proxmire*, 443 U.S. 111, 120 fn 9, 61 L Ed 2d 411, 99 S Ct 2675 (1979)?

II. Does the Supreme Court of Florida have jurisdiction under Art. V, Section 3(b)3, *Fla. Const.*, (*Fla. Rules of Appellate Proc.*, Rule 9.030(a)(2)(A)(iv) to review by discretionary review this cause in that there is an express direct conflict on the public figure issue as well as constitutional issue (*Fla. Rules of Appellate Proc.*, Rule 9.030(a)(2)(A)(ii) concerning a public figure in the decision of the Third District Court of Appeal in *Lampkin-Asam v. Miami News et al.*, (Dr. Lampkin-Asam is not a public figure as the Third Dist. erroneously decided) and the decisions in the U.S. Supreme Court, *Hutchinson v. Proxmire, supra; Time Inc. v. Firestone*, 424 U.S. 448, 47 L Ed 2d 154, 96 S Ct 958 (1976); *Wolston v. Reader's Digest Assoc. Inc.*, 443 U.S. 157, 99 S Ct 2701, 61 L Ed 2d 450 (1979); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974)?

III. Does the Supreme Court of Florida have jurisdiction under Art. V, section 3(b)3, *Fla. Const.*, (*Fla. Rules of Appellate Proc.*, Rule 9.030(a)(2)(A)(iv) to review by discretionary review this cause in that there is an express direct conflict on the "actual malice" issue as well as a constitutional issue (*Fla. Rules of Appellate Proc.*, Rule 9.030(a)(2)(A)(ii) concerning the "actual malice" issue ("actual malice" as defined in the *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964), in the decision of the Third District Court of Appeal in *Lampkin-Asam v. Miami News et al.*, and the decision in the Second Dist., *Holter v. WLCY, T.V., Inc., supra*; in the Fourth Dist.

Cape Publications, Inc. v. Adams, 336 So 2d 1197, (Fla. 4th DCA 1976); and the Supreme Court, *Hutchinson v. Proxmire*, 443 U.S. 111, 120 at fn 9 (1979)? NOTE: *Hutchinson v. Proxmire, supra* cited on page 3 of the Opinion of the Court (Appendix page A-3).

ARGUMENT

Argument Point 1: The Supreme Court of Florida does have jurisdiction to review express and direct conflicts in the district courts and the Supreme Court, concerning Summary Judgment in libel cases. The U.S. Supreme Court has noted, in reversing a summary judgment for a defendant, that proof of "actual malice" calls a defendant's state of mind into question and does not readily lend itself to summary disposition. See *Hutchinson v. Proxmire*, 443 U.S. 111, 120 at fn. 9 (1979). (Case *Hutchinson v. Proxmire, supra*, cited in Opinion page 3 (Appendix p. A-3). See *Herbert v. Lando*, 441 U.S. 153, 99 S Ct 1635, 60 L Ed 2d 115, (1979), that plaintiff has access into the editorial process to procure evidence bearing on the element of actual malice. In the instant case, "actual malice" is clearly shown in the depositions of Dunning and King and documents in the record from the book *Malignant Intrigue*, (See Appendix pp. A-19-32 and Exhibits for details). On p. 6 of the Opinion, (Appendix p. A-6), the Third District Court of Appeals failed to state the main conflicting fact in Dr. Dunning's deposition versus Ms. King's statement that she quoted the statements attributed to Dr. Dunning accurately (p. 4 of the Opinion, Appendix p. A-4). Dr. Dunning stated in the record p. 1252, "I do not recall ever saying anything to the Miami News about Dr. Asam." (Quoted also in Appellant Brief p. 6.) The Opinion of the Third District Court of Appeal failed to mention the obvious possibility that Ms. King *fabricated* the quotes attributed to Dr.

Dunning in the Miami News. (See *Burnett v. National Enquirer*, 7 Med L. Rptr 1321 (1981),

> "Magazine's publication, with actual malice, of libelous article that, in reporting on plaintiff's alleged conduct at restaurant, fabricated certain events, and magazine's bad faith in failing to publish adequate correction warrant award to plaintiff of $750,000 punitive damages."

Miami News failed to retract article (Appendix p. A-81) after notice statements were false (Appendix p. A-82). Ms. King was not scheduled to interview Dr. Lampkin-Asam but a Ms. Billy O'Day was scheduled (R. 1547-1559). Ms. King did the interview without Dr. Lampkin-Asam soliciting her. The Miami News article, Oct. 23, 1973 included a quote about Dr. Lampkin-Asam attributed to Dr. Dunning.

> "To which the highly respected Dr. Dunning says, 'She is very emotionally disturbed, and has no qualifications to do cancer research. She may have gotten her doctorate from George Washington University, but I suspect they gave her the degree to get rid of her.'" (See Appendix p. A-81).

Dr. Dunning (R. 1305) said it is a misstatement. The deposition of Dunning (R. 1252) read in the light most favorable to the plaintiff, Dunning denied having made these statements to King. There is ample evidence in the record from which a jury could conclude that Dunning was telling the truth, that King was lying and that the quotes published by King were fabricated. Given the "slightest doubt" standard (*First Mortgage Investors v. Boulevard Nat. Bank of Miami, supra* and *Mejiah v. Rodriguez, supra*) the issue of whether King had lied and created the quotes as a product of her imagination should be left to a jury. The courts of this state and the U.S. Supreme Court have

instructed us that these issues are not to be resolved by a summary judgment, but are to be decided by a jury as the finder of fact. The Third District Court of Appeal of the State of Florida is expressly and directly in conflict with libel action in the First District, Court of Appeal, in which the Florida court held that summary judgment should be sparingly granted so as not to infringe upon the constitutional right to a jury trial, *Axelrod v. Califano, supra*, and that the question of actual malice is one for a jury (*Holter v. WLCY, T.V., supra* in the Second District.)

Argument Point 2: The Supreme Court of Florida does have jurisdiction to decide whether Dr. Lampkin-Asam is a public figure as a matter of law. The decision of the Third District is expressly in direct conflict with the *First Amendment to the U.S. Constitution* because Dr. Lampkin-Asam is not a public figure according to the case of *Hutchinson v. Proxmire, supra* and the case of *Wolston v. Reader's Digest Assoc., Inc., supra;* (Both cases were cited on p. 3 of the Opinion, Appendix p. A-3, incorrectly indicating that Dr. Lampkin-Asam was a public figure as a matter of law). The similarity between the societal position held by Hutchinson and the societal position of the petitioner in the instant case is striking. Both Dr. Lampkin-Asam and Dr. Hutchinson are research scientist. The life histories of any two persons can always be distinguished on the facts, but the thrust of the *Hutchinson* decision is that this type of person is not to be considered a public figure for the purpose of the law of defamation. The U.S. Supreme Court reversed, holding that Hutchinson was not a public figure for purposes of defamation. The court stated that Hutchinson's activities and public profile are much like those of countless members of his profession. His published writings reached a relatively small category of professionals concerned with research in his

field of interest, 443 U.S. at 135. As shown by the *Hutchinson v. Proxmire, supra,* decision public figure status is not obtained by publishing scientific articles, receiving public grant money, active solicitation of other public grants, local press coverage of one's scientific activities and public interest in the precise activities for which one received funds. Under these standards, the plaintiff in the instant case is not a public figure for the purposes of the law of defamation.

As shown from the Firestone and Wolston decisions (cited above) extended coverage in the press, the holding of several press conferences, reports by the FBI and prominence in local society are not enough to make one a public figure. The petitioner in *Gertz v. Robert Welch, Inc., supra,* had published books and articles on legal issues; he had been active in local community affairs. Nevertheless, the court concluded that his activities did not make him a public figure.

The bottom line of this incorrect public figure decision by the Third District Court of Appeal is that the Third District has been misled by Mr. Averill's "figment of his imagination" that Dr. Lampkin-Asam is a public figure by stating in his brief for Appellees that Dr. Lampkin-Asam is a public figure with no reference to the record on p. 10 of his Appellee Brief,

> "She has attempted to arouse public indignation and to influence the allocation of public funds."

This is a false statement with no reference to the record; Dr. Lampkin-Asam has not influenced any allocation of public funds, and has not aroused any public indignation. Further, Mr. Averill stated,

> "She is a scientist taking part in a public debate on a public health matter."

This is a false statement with no reference to the record. The truth is that Dr. Lampkin-Asam has never been in a public debate. The instant case should be decided according to the facts in the record, not according to what an attorney, Mr. Averill, states in an Appellee Brief without reference to the record. Since such a gross error was made by the Third District Court, making an express direct conflict with other courts on the public figure issue, and by the Third Dist. deciding erroneously that Dr. Lampkin-Asam is a public figure, the Supreme Court of Florida should exercise its discretion and entertain the case on the merits if it does find it has discretionary jurisdiction, and allow the petitioner to write a merits brief and present oral argument.

The Miami News has failed to identify the alleged "public controversy." Under *Gertz*, (cited above) unless Plaintiff has acquired pervasive fame or notoriety Defendants must identify the particular public controversy into which she had injected herself before they can claim a privilege based upon the First and Fourteenth Amendments. Since the Gertz decision, the U.S. Supreme Court has repeated this requirement of a "public controversy" in *Time, Inc. v. Firestone, supra, Hutchinson v. Proxmire, supra* and *Wolston v. Readers Digest, supra.* There is no absolute constitutional protection for knowingly publishing false facts, (*N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). Ms. King libeled Dr. Lampkin-Asam by making the statement "almost paranoical" in the said news article, which is not privileged opinion when based on false facts, (*N.Y. Times Co. v. Sullvian, supra.*)

Argument Point 3: The Supreme Court of Florida does have jurisdiction since the Third District Court of Appeal is expressly and directly in conflict with the Second District in *Holter v. WLCY T.V., Inc., supra.* In reversing a

directed verdict for the defendants in a libel action by a public official, the court in *Holter v. WLCY T.V., Inc., supra* at 453, stated that the evasiveness and contradictions by a reporter are a ground for a jury to find that a reporter knew that his statements were false. The court found that repetition of another's words does not release one of responsibility if the reporter knew that the words are false or inherently improbable. According to Ms. King's deposition, she studied law; she certainly knew the statements attributed to Dr. Dunning were "libelous per se" and it was highly unlikely that a respected university such as The George Washington University would give someone a Ph.D. to get rid of them. Further, if Ms. King read *Malignant Intrigue* book as she claimed (R. 1202), then she would have seen on p. 48, (Appendix p. A-49), that Dr. Lampkin-Asam was an honor student and a member of the Sigma Xi; therefore, Ms. King knowingly published the false statements about Dr. Lampkin-Asam. Actual malice was shown by Ms. King and this case should be decided by a jury. The Third District Court of Appeal is expressly and directly in conflict with the Fourth District in *Cape Publications, Inc. v. Adams, supra,* (King was on notice Dunning was in a feud with Asam), the reporter in Cape Publications knew that his source had a feud with the subject of his story and was thus on notice as to the source's questionable credibility. This was one of the bases upon which the appellate court found sufficient evidence of actual malice and affirmed a jury verdict in favor of a public official.

In re *McDonough*, 296 N.W. 2d 648 (Minn. 1980), cited in the opinion, p. 4 (Appendix p. A-4), Dr. Lampkin-Asam has met this burden concerning proof of "actual malice" by the reporter, Ms. King, and Dr. Dunning, if she made the statements, by what is stated in the depositions of King and Dunning and the documents shown in the *Malignant*

Intrigue, which Ms. King (R. 1202), unequivocally stated that she said. The Third District is in direct conflict with the U.S. Supreme Court, (*Hutchinson v. Proxmire, supra*), concerning "actual malice" which states,

> "The proof of actual malice calls defendant's state of mind into question . . . and does not readily lend itself to summary disposition."

CONCLUSION

The Supreme Court of Florida should take discretionary jurisdiction because the Third District Court of Appeal has (1) expressly and directly made a decision that conflicts with decisions of another district court of appeal or of the Supreme Court on the same question of law, and (2) expressly made a decision that construes a provision of the state or federal constitution. The Supreme Court of Florida after taking jurisdiction should decide the case on the merits or remand for a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdiction Brief and Appendix, bound separately, was sent by mail this 25th day of February, 1982 to Mr. Joseph Averill, Attorney, 1237 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

By: /s/ Julia McCain Lampkin-Asam
Julia McCain Lampkin-Asam, Ph.D.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,784

JULIA McCAIN LAMPKIN-ASAM, Ph.D.,
Petitioner,

vs.

MIAMI DAILY NEWS, INC., a Florida Corporation, d/b/a The Miami News, and Timothy Johnson, as personal representative of the late Terry Johnson King,
Respondents.

RESPONDENTS' JURISDICTIONAL BRIEF

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*Pagination of typescript brief.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,784

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Respondents.

PRELIMINARY STATEMENT

Despite its incantation of the talismanic "expressly and directly" language, Petitioner's Jurisdictional Brief fails to provide any basis for discretionary review by this court of the decision of the District Court of Appeal, Third District, in this action.

To support her ill-founded assertion of express and direct conflict, Petitioner is reduced to quarreling with the facts stated in the Third District's decision. She also adopts the happy—but impermissible[1]—expedient of asserting conflict with decisions from other jurisdictions and with decisions of the federal courts.

Since the 1980 reform of this Court's jurisdiction, that jurisdiction is certainly no broader than that recognized in *Nielsen v. City of Sarasota*, 117 So.2d 731, 734 (Fla. 1960):

> While conceivably there may be other circumstances, the principle situations justifying the invocation of our jurisdiction to review decisions of courts of appeal because of alleged conflict are (1) the announce-

1. *See, e.g. Kyle v. Kyle*, 139 So.2d 885 (Fla. 1962).

> ment of a *rule of law* which conflicts with the rule previously announced by this court; or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this court.
>
> Under the first situation the facts are immaterial. It is the announcement of a conflicting rule of law that conveys jurisdiction to us to review the decision of the court of appeal. Under the second situation the controlling facts become vital and our jurisdiction may be asserted only where the court of appeal has applied a recognized rule of law to reach a conflicting conclusion in a case involving substantially the same controlling facts as were involved in allegedly conflicting decisions of this court.

A review of petitioner's jurisdictional brief reveals that she can discern no "rule of law" in the Third District's opinion which conflicts with any rule of law articulated by this court or another district court. Rather, her argument is a factual one and, to create the appearance of conflict, the Petitioner finds it necessary to go behind the facts set forth by the Third District and invite this court to declare the Third District to be factually incorrect.

If the court accepts this invitation to revive "record conflict," it will undo the re-working of Article V, Section 3 of the Florida Constitution which went into effect on April 1, 1980. Since that date, as was held in *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980):

> This court may only review the decision of a district court of appeal that *expressly* and directly conflicts with a decision of another court of appeal or the supreme court on the same question of law. The dictionary definitions of the term "express" include: "to

> represent in words"; "to give expression to." "Expressly" is defined: "in an express manner."

Since the 1980 revision of this court's jurisdiction, this court may review only a "decision" of a district court. No longer will the language and expressions found in a dissenting or concurring opinion support jurisdiction. *Jenkins v. State, supra.* The "record proper" conflict of *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla. 1965) is a thing of the past. The Petitioner is not permitted to quarrel with the facts set forth in the Third District's opinion to assert "record conflict." Florida's jurisprudence has returned to the view, expressed by this court in *Commerce National Bank v. Safeco Insurance Co.*, 284 So.2d 205, 207 (Fla. 1973) that:

> When facts and testimony are set forth in a majority opinion, they are assumed to be an accurate representation upon which the judgment of the court is based.

Talismanic language aside, Petitioner's position is simply that the Third District was wrong. To make even a colorable showing, she is forced to dispute the facts articulated by the Third District. The Petitioner seeks a different result, not review of a decision which expressly and directly conflicts with another decision. As this court noted in *Ansin v. Thurston*, 101 So.2d 808, 811 (Fla. 1958):

> A limitation of review to decisions in "direct conflict" clearly evidences a concern with decisions as precedents as opposed to adjudications of the right of particular litigants.

This particular litigant simply wants a second appeal under the guise of "record conflict." While she may have been, in a sense, entitled to this prior to April, 1980, she no longer is. This court is without jurisdiction to review

the Third District's decision since there is represented in the words of that decision no direct conflict with any other Florida decision.

THE "SUMMARY JUDGMENT" ISSUE

The Third District's decision does not dispute that, under appropriate circumstances, "actual malice" may be an issue for a jury. Nor did the Third District dispute the rule that summary judgment should not be entered if there is the "slightest doubt" concerning its propriety. Rather, the Third District found absolutely no evidence that the Petitioner could meet her burden of proof. (Petitioner's Appendix, p. A-4.) Where there is absolutely no evidence to support a plaintiff's lawsuit, summary judgment is proper; no Florida case has ever suggested to the contrary. As this court noted in *Nielsen v. City of Sarasota, supra,* 117 So.2d at 734:

> In the instant case the court of appeal, as we read its opinion, merely held that on the basis of the record before it there was a total absence of evidence. . . . We do not here suggest that if we had been charged with the responsibility of the court of appeal in the instant case we would have reached the same conclusion that they reached. In fact, it is altogether possible that we might have arrived at an entirely different conclusion as to the ultimate effect of the circumstantial evidence and justifiable inferences to be drawn therefrom. [Citation omitted.] Such a difference of view, however, is not the measure of an appellate jurisdiction to review decisions of courts of appeal because of alleged conflict with prior decision of this court on the same point of law.

In viewing the evidence most favorably to the Petitioner and in concluding that the record contained absolutely

no evidence that Petitioner could support her burden of proof on trial, the Third District decision in no way expressly or directly conflicts with the Florida case law.

THE "PUBLIC FIGURE" ISSUE

In disputing the Third District's holding that she is a "public figure" for the purposes of libel law, Petitioner presents three pages of argument without citation to a single Florida decision. She asserts, at page 6 of her brief:

> The decision of the District court is expressly in direct conflict with the *First Amendment to the U.S. Constitution* because Dr. Lampkin-Asam is not a public figure. . . [Emphasis in original.]

Such an argument entirely misconceives this court's jurisdiction. The Third District's decision did not expressly explain or amplify a provision of the state or federal constitution. The Third District merely applied—and correctly so—a well-developed body of federal and Florida case law to determine the Petitioner to be, for purposes of libel law, a "public figure". Mere application of constitutionalized law is insufficient to vest jurisdiction in this court. *Ogle v. Pepin*, 273 So.2d 391 (Fla. 1973); *Armstrong v. City of Tampa*, 106 So.2d 407 (Fla. 1958).

THE "ACTUAL MALICE" ISSUE

Petitioner does not quarrel with the Third District's formulation of "actual malice" in the constitutional sense. Found at Petitioner's Appendix, p. A-4, that formulation of "actual malice" is this:

> The publication involved was deliberately falsified or published recklessly despite the publisher's awareness of probable falsity. . . .

The Third District then examined the evidence in the record and properly concluded that Petitioner, under no view of the facts, could present a jury issue on the "actual malice" issue. In so doing, the Third District acted correctly and certainly created no express and direct conflict with prior Florida case law. Indeed, Petitioner complains of none.

Rather, Petitioner seems to suggest that the Third District produced a different result in a case which involves substantially the same controlling facts as a prior case. That prior case, in Petitioner's view, is *Holter v. WLCY T.V., Inc.*, 366 So.2d 445 (Fla. 2d DCA 1979). But the facts in *Holter* are totally different from the facts here. *Holter* involved a succession of television and radio news broadcasts. During the day and a half involved in the repeated broadcasts of the same story, the defendants acquired significant information concerning the accuracy of their story but did not, in the slightest, vary the broadcasts. In sum, the *Holter* broadcast involved assertions that a "hush-hush undercover probe" had uncovered "serious irregularities" and that the mayor, who was resigning from office, was strongly suspected of embezzlement and extortion. Although the reporter had assured his superiors that his report was based on a known and reliable source, the report was in fact based on an anonymous and unverified telephone call.[2] Even the anonymous telephone caller had not accused the mayor of embezzlement and extortion. A claim that a "full team of undercover men" was involved in the investigation was a fabrication. The

---

2. Petitioner would have this court believe that the testimony in this case by a reporter demonstrated evasiveness and contradiction. (Petitioner's Jurisdictional Brief, p. 9.) Not unsurprisingly, the Third District noted that the reporter testified "unequivocally." (Petitioner's Appendix, p. A-4.) Petitioner now contends, for the first time and impermissibly, that the reporter's testimony was "inherently improbable."

station was even unable to confirm that an investigation was underway prior to the first broadcast. During the succession of broadcasts, the mayor involved protested to the reporter who admitted there may be a "mix-up." Despite this admission of a possible "mix-up," the television and radio reports continued. On this evidence, the Second District properly concluded that a jury issue as to "actual malice" was present.

But those facts and that conclusion have nothing to do with this case.[3] The evidence as to the *Holter* reporter's state of mind permitted an inference of "actual malice." Here, the evidence, viewed most favorably to the Petitioner, does not permit such an inference. Although there are some variances in the testimony, the Third District was correct in concluding that the variances present in the testimony would not lawfully permit a jury, even viewed in the most favorable light, to find for the Petitioner. There if no conflict.

CONCLUSION

The Petitioner has totally failed to show that the decision of the District Court of Appeal, Third District, in this action expressly and directly conflicts with any prior decision in this state. Accordingly, it is submitted that the "Notice to Invoke Discretionary Jurisdiction" be

---

3. There is an "Alice-in-Wonderland" quality to Petitioner's assertion that probative evidence of "actual malice" is to be found in the alleged "feud" between Dr. Dunning and the Petitioner. *Cape Publications, Inc. v. Adams*, 336 So.2d 1197 (Fla. 4th DCA 1976). The alleged "feud" reduced Dr. Dunning, according to Petitioner, to "questionable creditability." But as the Third District noted, Petitioner made Dr. Dunning the "primary villian" of the autobiography. Dr. Dunning's role was not that of instigator of the story. Her role was passive, not active. The article in question was not provoked by and based on the statements of a vengeful and anonymous source.

dismissed and the Third District's correct and well-reasoned decision be allowed to stand.

Respectfully submitted,

/s/ Joseph P. Averill
Joseph P. Averill
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Miami, Florida 33130
(305) 377-3577

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Jurisdictional Brief was mailed this 16 day of March, 1982, to Julia McCain Lampkin-Asam, Ph.D., Pro Se, 2243 Gorham Avenue, Ft. Myers, Florida 33907.

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/s/ Joseph P. Averill

SUPREME COURT OF FLORIDA
MONDAY, JUNE 7, 1982

CASE NO. 61,784

District Court of Appeal, 3d District - No. 80-2053
JULIAN McCAIN LAMPKIN-ASAM, Ph.D.,
Petitioner,

v.

MIAMI DAILY NEWS, INC., etc., et al.,
Respondents.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.
By: /s/ Debbie Causseaux
Deputy Clerk

TC

cc: Hon. Louis J. Spallone, Clerk
Hon. Dan Satin, Judge
Hon. Richard P. Brinker, Clerk
Julia McCain Lampkin-Asam, Ph.D.
Joseph P. Averill, Esquire

Office - Supreme Court, U.S.
FILED
SEP 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-193

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Julia McCain Lampkin-Asam, Ph.D.
Appellant

vs.

District Court of Appeal, Third District of Florida; Supreme Court of Florida; State of Florida; Miami Daily News, d/b/a/ The Miami News, and Timothy Johnson, as personal representative of the late Terry Johnson King
Appellees

On Appeal from District Court of Appeal, Third District of Florida

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Julia McCain Lampkin-Asam, Ph.D.
Appellant, Pro Se
2243 Gorham Avenue
Ft. Myers, Florida 33907

PARTIES TO THE PROCEEDING

Julia McCain Lampkin-Asam, Ph.D. Appellant, (Plaintiff, Appellant and Petitioner below).

Miami Daily News, Inc., a Florida Corporation, d/b/a/ The Miami News, and Timothy Johnson, as personal representative of the late Terry Johnson King, Appellees, (Defendants, Appellees, and Respondents), Attorney Mr. Joseph P. Averill

State of Florida

Hon. Governor Daniel Robert Graham

Attorney General, Jim Smith

The Supreme Court of Florida

District Court of Appeal, Third District of Florida

Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

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No. 82-193

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Julia McCain Lampkin-Asam, Ph.D.
Appellant

vs.

District Court of Appeal, Third District of Florida; Supreme Court of Florida; State of Florida; Miami Daily News, d/b/a/ The Miami News, and Timothy Johnson, as personal representative of the late Terry Johnson King
Appellees

On Appeal from District Court of Appeal, Third District of Florida

Brief Opposing Motion to Dismiss or Affirm

This Appellant's Brief is opposing the Appellee's Motion ...to Dismiss or Affirm because substantial federal question exists

whereby a new state law, Florida Constitution (1980), Article V, section 3(b)(3) is repugnant to the U.S. Constitution, specifically "due process" of the 5th and 14th Amendments to the U.S. Constitution and "equal protection" of the 14th Amendment to the U.S. Constitution when the Appellant does not have access to the highest court of the state, The Supreme Court of Florida to decide a federal question (whether Dr. Asam is a public figure and actual malice is shown in the constitutional sense of the First Amendment to the U.S. Constitution). The Supreme Court of the United States can take jurisdiction under 28 U.S.C. 1257(2). The Appellant respectfully requests the Supreme Court of the United States to take original jurisdiction of the instant case and decide on the merits of the case since Dr. Asam is not a public figure and the said statements (quoted p. 43 of Appellant's Jurisdiction Statement) are libelous per se.

The Appellant respectfully requests the Supreme Court of the United States to take original jurisdiction or remand to the lower circuit court for a jury. See 28 U.S.C. section 2106).

STATEMENT

The Appellant adheres to the Questions Presented, Tables of Authorities, Constitutional Provisions and Statutes Involved, Statement of the Case, Substantiality of the Questions, Conclusion and Appendix of the Jurisdictional Statement Brief by the Appellant, docketed Aug. 4, 1982 as 82-193. This Brief Opposing Appellee's Motion...to dismiss or affirm is a rebuttal brief.

ARGUMENT

On p. 2, paragraph no. 1, the Appellee's Brief, the Appellee incorrectly uses Rule 16(a) as a grounds to dismiss because the Appellee failed to answer to 28 U.S.C. 1257 (2), concerning a new Florida Statute, Florida Constitution, (1980, Article V,

section 3(b)3 that is repugnant to the U.S. Constitution because the Appellant did not have access to the highest court of Florida (Supreme Court of Florida).

On p. 2 paragraph 2, of Appellee's Brief, Rule 16(b) is not applicable since substantial federal questions sought to be reviewed (see Jurisdictional Statement, Questions Presented by Appellant), were timely presented below at the circuit court and appellate levels. See pp. A-31-A-33, Appendix of the Jurisdictional Statement of Appellant for Complaint showing the question of the First Amendment to the U.S. Constitution was raised from the beginning in the circuit court. See the Record p. 1907, "Motion for Re-Hearing or Set Aside the Summary Final Judgment", dated Oct. 17, 1980, which implies lack of "due process" (5th and 14th Amendments to U.S. Conatitution) since the circuit court should have had a jury trial. This Record p. 1907 con-

flicts with p. 13 of Appellee's brief, 2nd paragraph on due process.

Also see quotes from Appellant's brief in Appendix pp. A-2-A-9 of this brief showing the question of a jury trial was before the intermediate appellate court, District Court of Appeal, Third District of Florida.

On p. 2, paragraph 4, Rule 16(c) in the Appellee's Brief, the statement,

..."the decision of this cause depends are so unsubstantial as to not need further argument."

is <u>false</u> because substantial federal questions do exists (see Questions Presented in Jurisdictional Statement of Appellant). The constitutional question of "actual malice" according to the <u>New York Times Co. v. Sullivan</u>, 376 U.S. 254, 84 S Ct. 710, 11 L. Ed. 2d 686, (1964), was not considered by a jury when enormous evidence is in the record showing actual malice by the Miami News reporter (see pp. 25-35 of the Jurisdictional Statement by Appellant). Further,

the worse constitutional infringement, an abuse of the 1st Amendment to the U.S. Constitution, was the creation of facts by the Miami News' attorney, Mr. Averill, by perpetrating a fraud on the court to believe Dr. Asam was in a public debate when he made no reference in the record to where any public debate had taken place (Appellee's Brief, reprinting Appellant's brief pp. A-22-A-23 showing that at the state level, appellate court was notified of Mr. Averill's fradulent behavior). For this reason alone the public figure issues should be reversed that Dr. Asam is not a public figure since she has not been in a public debate. (Also see pp. 18-19 of the Jurisdictional Statement of Appellant, discussing and quoting the false statements made by Mr. Averill to create false facts, making Dr. Asam to appear as a public figure after the Miami News fabricated the statement attributed to Dr. Dunning. Facts created by opposition

attorney are not due process.

On p. 8 of the Appellee's Brief concerning "the trial court had not accorded due deference to her constitutional rights", (see record pp. 1905-1906, "Motion for reconsideration of Order on "Public Figure Issue", dated Oct. 1, 1980 and Record pp. 1907-1908, discussed p. 4 of this brief.

Page 8 of Appellee's brief states,

> "At no point did she suggest to the Florida Supreme Court that the trial court or the intermediate appellate court failed to respect her constitutional rights".

is false (see p. A-1 of this brief and also in the Jurisdiction Statement by Appellant, p. A-12), quoted here,

> "The decision (2) expressly construes a provision of the state or federal constitution."

See Axelrod v. Califano, 357 So 2d 1048, 1051, (Fla. 1st DCA 1978), which states,

> "Summary judgment should be sparingly granted so as not to infringe upon the constitutional right to a jury trial."

This Florida case conflicts with Mr. Averill

on p. 12, last paragraph of his Appellee's brief on the 6th Amendment to the U.S. Constitution.

This instant case should not be dismissed or affirmed on some legal technicality when such a gross miscarriage of justice has already been shown by the Florida Courts in infringing on the Appellant's U.S. Constitutional rights. To give another example see Lampkin-Asam v. Miami Daily News, Inc., 408 So 2d 666, (1. Constitutional Law 90.1(5) and note this is from the first footnote by Judge Pearson. p. 667. The point is that the words "almost paranoical" is taken out of context from the Miami News article and if one was to read the article there are no facts in the editor's column justifying this statement. This is abuse of the First Amendment rights of Dr. Asam, first by the Judge on p. 667, and then by whoever wrote the keys to p. 666. The Appellant hopes th[illegible] Supreme Court of the United States will

accept jurisdiction and the Appellant will be allowed to write a merits brief. Oral argument is requested so that the facts and law in this case can be understood. Mr. Averill should answer at oral argument why he fabricated facts in this case to make Dr. Asam appear as a public figure with no reference in the record; for example, stating that Dr. Asam was in a public debate when she was never in a public debate. (See p. 6 of this brief).

Judge Pearson failed to consider fabrication which is a jury question but he claimed if facetiously stated, OK; however, record indicates fabrication by reporter, (see pp. A-11-A-13, this brief, and p. 49 of Jurisdictional Statement Brief of Appellant).

> "She is very emotionally disturbed, and has no qualifications to do cancer research. She may have gotten her doctorate from George Washington University, but I suspected they gave her the degree to get rid of her." (Miami News, Oct. 23, 1973).

These statements have "murdered" a meritorious cancer research project and professional career of the Appellant, Dr. Asam,

since the cancer research project has been blocked for almost a decade. There is no doubt about it that substantial federal questions exists (see Questions Presented in Jurisdictional Statement by Appellant).

CONCLUSION

The Appellant adheres to the Conclusion articulated in the Jurisdictional Statement. The Supreme Court of the United States should take jurisdiction under 28 U.S.C. sec. 1257(2), 28 U.S.C. sec. 2106, 28 U.S.C. sec. 1343(3), and 42 U.S.C. sec. 1983. The Summary Judgment should be reversed. The Supreme Court of the United States should consider the merits of the case and decide on the public figure, actual malice, "libelous per se", and damages issues, or as an alternative remand for a jury trial on the "libelous per se" or actual malice issues.

Respectfully submitted,

Julia McCain Lampkin-Asam

Julia McCain Lampkin-Asam, Ph.D.
Appellant, Pro Se
2243 Gorham Ave., Ft. Myers, Fla. 33907

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by certified mail to Hon. Robert Graham, Governor of the State of Florida, The Capitol, Tallhassee, Florida; Hon. Jim Smith, Attorney General, State of Florida, The Capitol, Tallahassee, Florida; Mr. Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301; Mr. Louis J. Spallone, Clerk, District Court of Appeal, Third District, 2001 S.W. 117 Ave., Miami, Florida 33165; Mr. Richard P. Brinker, Clerk, Circuit Court, Eleventh Judicial Circuit in and for Dade County, Dade County Courthouse, 73 West Flagler St., Miami, Florida 33130; and Mr. Joseph P. Averill, Attorney, representing the Miami News et al., 1237 City National Bank Building, 25 West Flagler St., Miami, Florida 33130 this 8th day of September 1982.

By: Julia McCain Lampkin-Asam

Julia McCain Lampkin-Asam, Ph.D.

APPENDIX

A-1

Exhibit A

"IN THE DISTRICT COURT OF APPEAL TO THE THIRD DISTRICT OF FLORIDA"

Case No. 80-2053

"NOTICE TO INVOKE DISCRETIONARY JURISDICTION"

JULIA McCAIN LAMPKIN-ASAM, Ph.D.
Plaintiff, Appellant, Petitioner
vs.
MIAMI DAILY NEWS, INC., a Florida Corporation, d/b/a/ The Miami News, and TIMOTHY JOHNSON, as personal representative of the late TERRY JOHNSON KING,
Defendants, Appellees, Respondents"

"NOTICE IS GIVEN that Julia McCain Lampkin-Asam, Ph.D., Plaintiff, Appellant, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered December 29, 1981 (Seven-page opinion filed December 29, 1981); rehearing denied on January 27, 1982.

"The decision (1) expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law,and (2) expressly construes a provision of the state or federal constitution."

"Respectfully submitted,
s/ Julia McCain Lampkin Asam
Julia McCain Lampkin-Asam, Ph.D.,
Pro Se
Plaintiff, Appellant, Petitioner
2243 Gorham Ave.
Ft. Myers, Florida 33907

"CERTIFICATE OF SERVICE"

"I HEREBY CERTIFY that a true and correct copy of the foregoing Notice to Invoke Discretionary Jurisdiction was sent by mail this 18th day of February, 1982 to Mr. Joseph Averill, ..."

By: s/ Julia McCain Lampkin Asam

Exhibit B

"IN THE DISTRICT COURT OF APPEAL OF
FLORIDA THIRD DISTRICT Case no. 80-2053

Julia McCain Lampkin-Asam,
Appellant,
vs.
Miami Daily News, Inc. and
Timothy Johnson,
Appellees

On Review from the Circuit Court of the
Eleventh Judicial Circuit

General Jurisdiction Division
Case no. 75-32943

BRIEF OF APPELLANT

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"ARGUMENT

I

"THE COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR DEFENDANTS MIAMI DAILY NEWS, INC. AND KING.

In order to obtain a summary judgment, the moving party must prove the non-existence of a genuine issue of material fact and must prove it conclusively. Hall v. Tolcott, 191 So 2d 40, 43 (Fla. 1966). The burden of a party moving for summary judgment is greater than that of the plaintiff at trial. Visingardi v. Tirone, 193 So 2d 601, 604 (Fla. 1966). The movant must show that the opposing party cannot prevail. Mejiah v. Rodriguez, 342 So 2d 1066,1067 (Fla. 3d DCA 1977).

In ruling on a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party. First National Bank of Tampa v. Pappas, 372 So 2d 989, 990 (Fla. 2nd DCA 1979). All doubts regarding the existence of a genuine issue of fact must be resolved against the moving party. Moore v. Japanese Gardens Mobile Estates, Inc. 365 So 2d 922, 924 (Fla. 2d DCA 1978). All reasonable inferences must be drawn in favor of the opposing party. Hall v. Tolcott, supra at 45, and all favorable issues reasonably justified from the record are liberally construed in favor of the party who is opposing the action. Davis v. 7-Eleven Food Stores, Inc., 294 So 2d 111, 112 (Fla. 1st DCA 1974).

"If the evidence raises any doubt on an issue of material fact, or is such as will permit different reasonable inferences bearing on the existence of such an issue, summary judgment is not proper. First Mortgage Investors v. Boulevard National Bank of Miami, 327 So 2d 830, 832 (Fla. 3d DCA 1976). More recently the Third

"District Court of Appeal has held:

> "If the existence of such issues or the possibility of their existence is reflected in the record, or the record ever raises the slightest doubt in this respect, the summary judgment must be reversed.
>
> Mejiah v. Rodriguez, supra at 1067-1068.

It is the appellant's position that when all of the evidence is viewed in a light most favorable to her, with all inferences drawn against the defendants and liberally construed in her favor, the "slightest doubt" standard has not been met by the parties moving for summary judgment in this case.

The modern law of defamation, where a newspaper is a defendant, begins with the case of New York Times v. Sullivan, 376 U.S. 254 (1964). In that case the Supreme Court established a federal standard that a newspaer could not be held liable for a defamation against a "public official" unless the plaintiff could prove that the defamatory statement was made with actual malice -- that is with knowledge that the statement was false or with reckless disregard of whether it was false or not. 376 U.S. at 279-280.

In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), this same "actual malice" standard was applied to persons who were deemed "public figures". The decision in Butts was announced through four opinions. Though Justice Harlan's opinion announced the decision of the court, the concurring opinion of Chief Justice Warren had the support of four other justices and established the defamation standard for public figures. That Chief Justice Warren's decision established the controlling standard was recognized by the court in Gertz v. Welch,

"418 U.S. 323, 336 (1974).

Whether a statement has been published in reckless disregard of whether it was false or not is to be decided on a case by case basis. St. Amant v. Thompson, 390 U.S. 727, 730 (1968). The St. Amant decision provides the following guidance as to when the actual malice standard could be met:

"1. Publisher is aware of the likelihood that he is circulating false information. 390 U.S. at 731.

2. A false publication was made with a high degree of awareness of probable falsity. 390 U.S. at 731.

3. Evidence of deliberate falsification. 390 U.S. at 731.

4. Defendant entertained serious doubts as to the truth of his publication. 390 U.S. at 731.

The court ruled in St. Amant that:

"The defendant in a defamation action brought by a public official, cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by a defendant, is the product of his imagination, anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. 390 U.S. at 732.

In Greenbelt Cooperative Publishing Association v. Bressler, 398 U.S. 6 (1970), the court held that the term blackmail as published had been used as "hyperbole" and

"therefore no actual malice had been shown, but went on to state that if the newspaper reports had been truncated or distorted in such a way as to extract the word "blackmail" from the context in which it was used at the public meeting reported this would be a different case. 398 U.S. at 13.

"The Supreme Court has noted, in reversing a summary judgment for a defendant, that proof of "actual malice" calls a defendant's state of mind into question and does not readily lend itself to summary disposition. Hutchinson v. Proxmire, 443 U.S. 111, 120 at fn. 9 (1979). In libel actions, Florida courts have held that summary judgment should be sparingly granted so as not to infringe upon the constitutional right to a jury trial, Axelrod v. Califano, 357 So 2d 1048, 1051 (Fla. 1st DCA 1978), and that the question of actual malice is one for a jury. Holter v. WLCY T.V., Inc., 366 So 2d 445 (Fla. 2d DCA 1978).

In Gertz v. Welch, supra at 349, the Supreme Court held that, in defamation actions by private individuals against the public media, punitive damages could not be recovered unless the proof met the New York Times standard. Citing Gertz, the decision in Cape Publications, Inc. v. Teri's Health Studio, 385 So 2d 188, 189-190 (Fla. 5th DCA 1980), held that in order to recover punitive damages the plaintiff would have to prove malice, bad faith or reckless disregard for the truth or falsity of the story.

In Cape Publications, Inc. v. Adams, 336 So 2d 1197 (Fla. 4th DCA 1976), the reporter knew that his source had a feud with the subject of his story and was thus on notice as to the source's questionable credibility. This was one of the bases upon which the appellate court found

"sufficient evidence of actual malice and affirmed a jury verdict in favor of a public official. In reversing a directed verdict for the defendants in a libel action by a public official, the court in Holter v. WLCY T.V., Inc., supra at 453, stated that the evasiveness and contradictions by a reporter knew that his statements were false. The court also indicated that portrayal of an existing situation in an extremely misleading fashion was grounds for finding actual malice. 366 So 2d at 453-454, and that repetition of another's words does not release one of responsibility if the reporter knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his report. 366 So 2d at 454. "...More significantly, the Supreme Court has told us that a fabricated story is not protected by the New York Times rule. King quoted Dunning as saying that Asam was very emotionally disturbed, has no qualifications to do cancer research and that Dunning suspected that Asam received her Ph.D. because a university was trying to get rid of her. Read in the light most favorable to the Plaintiff, Dunning denied having made these statements to King. There is ample evidence in the record from which a jury could conclude that Dunning was telling the truth, that King was lying and that the quotes published by King were fabrications. Given the "slightest doubt" standard, the issue of whether King had lied and created the quotes as a product of her imagination should be left to a jury.

We are concerned with an issue of the reporter's state of mind. The testimony of Dunning conflicts with the testimony of King in many respects. At the least, a

"reconciliation of the testimony of Dunning and King would require the admission that King had taken Dunning's statements out of the context in which they were used, in order to present a situation that was extremely misleading. The courts of this state and the United States Supreme Court have instructed us that these issues are not to be resolved by a summary judgment, but are to be decided by a jury as the finder of fact.

"...The plaintiff in the instant case did not make policy determinations that were traditionally channeled through formal political institutions. She was not intimately involved in the resolution of important public questions. Her position does not invite public scrutiny and discussion entirely apart from the scrutiny and discussion occasioned by the particular charges. She does not hold an "influential role in ordering society." Asam did not have regular and continuing access to the media or any of the accouterments of having become a public figure. Most importantly, her views and actions with respect to a public issue or event were not as much concern to the citizens as the attitudes and behavior of public officials with respect to the same issues and events.

"As shown from the Firestone and Wolston decisions, extended coverage in the press, the holding of several press conferences, reports by the FBI and prominence in local society are not enough to make one a public figure. As shown by the Hutchinson decision, public figure status is not obtained by publishing scientific articles, receiving public grant money, active solicitation of other public grants, local press coverage of one's scientific activities and public interest in the precise activities for which one received funds. Under these

standards, the plaintiff in the instant case is not a public figure for purposes of the law of defamation.

CONCLUSION

"This court should reverse the final summary judgment entered by the lower court and remand the case for a trial by jury on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant was furnished by mail this 6th day of February, 1981 to Joseph Averill, 1237 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

s/_____

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Exhibit C

"IN THE DISTRICT COURT OF APPEAL OF

FLORIDA THIRD DISTRICT Case no. 80-2053

Julia McCain Lampkin-Asam
Appellant

vs.

Miami Daily News, Inc. and
Timothy Johnson,
Appellees

On Review from the Circuit Court of the
Eleventh Judicial Circuit

General Jurisdiction Division
Case no. 75-32943

REPLY BRIEF OF APPELLANT

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...

"The summary judgment rule set forth in Time, Inc. v. McLaney, 406 F. 2d 565, (5th Cir 1969), is that federal courts are reluctant to deprive a litigant of the opportunity to present his case to the jury and that upon a motion for summary judgment all of the facts and inferences to be drawn therefrom are to be construed in favor of the party against whom judgment is sought. 496 F. 2d at 571.

Defendants contend that the plaintiff has failed to raise a genuine issue of fact concerning the publisher's state of mind under the rule set forth in St. Amant v.

Thompson, 390 U.S. 727 (1968). The St. Amant opinion makes it clear that this state of mind requirement will be met where a story is fabricated by a defendant. 390 US at 732.

The statements that are at issue in this case are alleged quotes from Dr. Wilhelmina Dunning about the plaintiff. At her deposition Dr. Dunning said (in addition to the passage quoted at page 6 of the initial Brief of Appellant).

> "I certainly did not say, "She may have gotten her Doctorate from George Washington University," because I knew she had. (R 1251)

At Dr. Dunning's deposition the question was asked:

> "Prior to October 1, 1973, and for purposes of simply advising you of our chronology, the article, again, is October 23rd of 1973.
>
> "Had you had any telephone conversation or any form of communication whatsoever with Terry Johnson King? (R 1253)

and Dr. Dunning replied:

> "Not that I recall. (R 1253)

"The following colloquy took place at the deposition of Dr. Dunning:

"Q. Do you recall a time prior to October 23, 1973, when you had any communication or correspondence with Terry Johnson King?

"A. I do not recall it.

"Q. Do you recall having received a telephone call from any individual who identified themselves as a reporter or employee of The Miami News at any time prior to October 23, 1973?

"A. No.

"Q. Do you now understand and believe such a telephone call to have been made to you prior to October 23, 1973?

"A I do not.

"Q. Had The Miami News or anyone identifying themselves as being associated with or employed by The Miami News ever contacted you for any purpose whatsoever prior to October 23, 1973?

"A Oh, yes. They had written several articles about me in years before.

"Q And you recall having been contacted then?

"A And, usually, when they did contact me, they submitted the article for my approval before publishing it.

" "(R 1254)

"Dr. Dunning's testimony can support a jury finding that she never had a conversation with King. Plaintiff assets that the alleged quotes from Dr. Dunning, which are the essence of the defamatory matter, were fabricated by the defendants. Fabrication is sufficient to show that the defendants knew what they were printing was false." (Emphasis added.)